

Indiana Law Review



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CENTENNIAL YEAR
1894/1895—1994/1995

INDIANA UNIVERSITY

DEDICATION

R. Bruce Townsend

SEPTEMBER SURVEY OF RECENT DEVELOPMENTS IN INDIANA LAW

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The Honorable Chief Justice Randall T. Shepard
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Lisa Clark Copp
Marcia Gonzales

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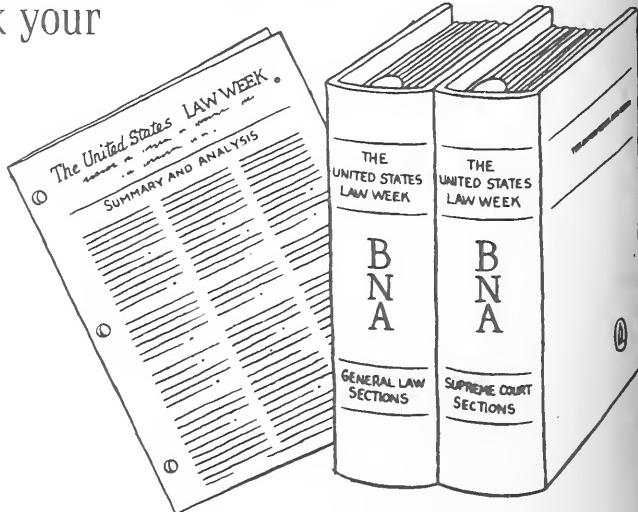
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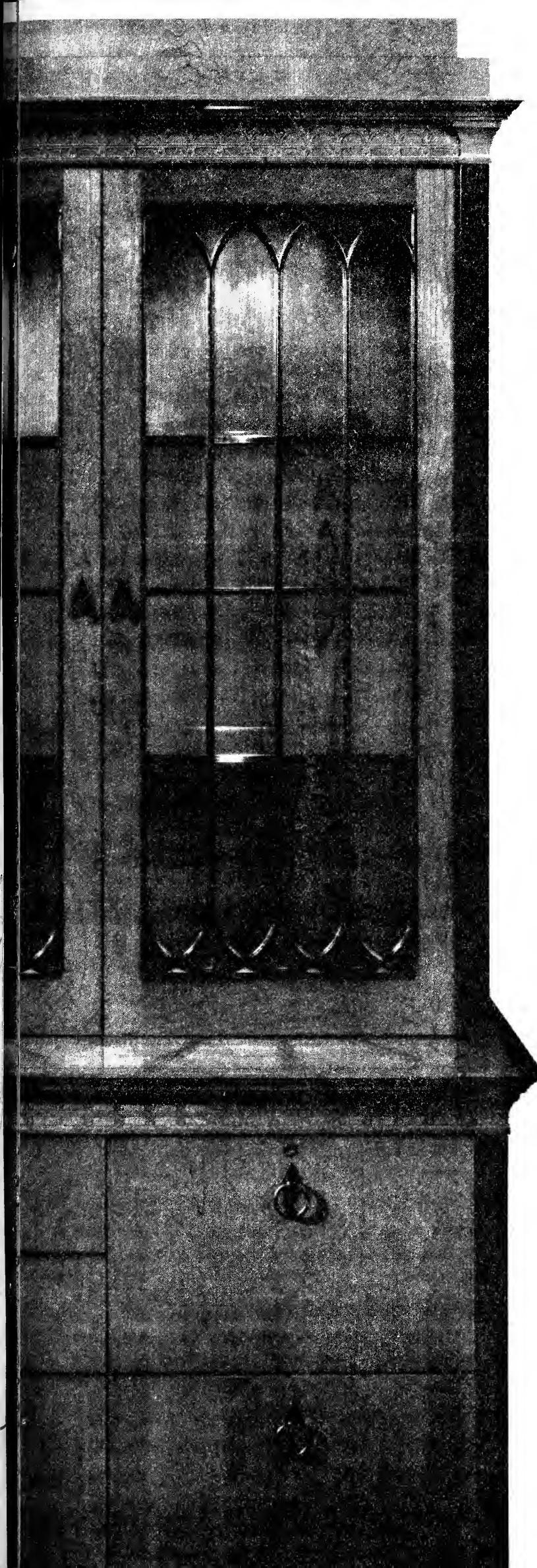
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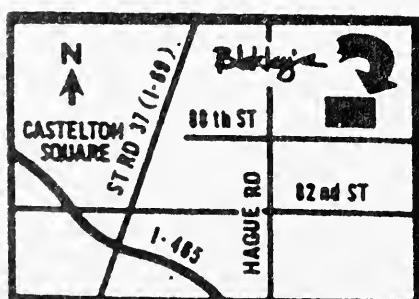
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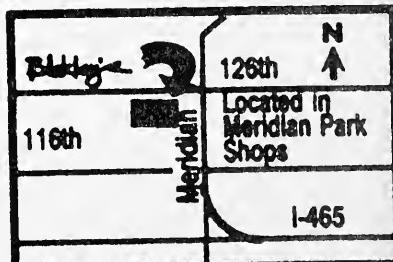
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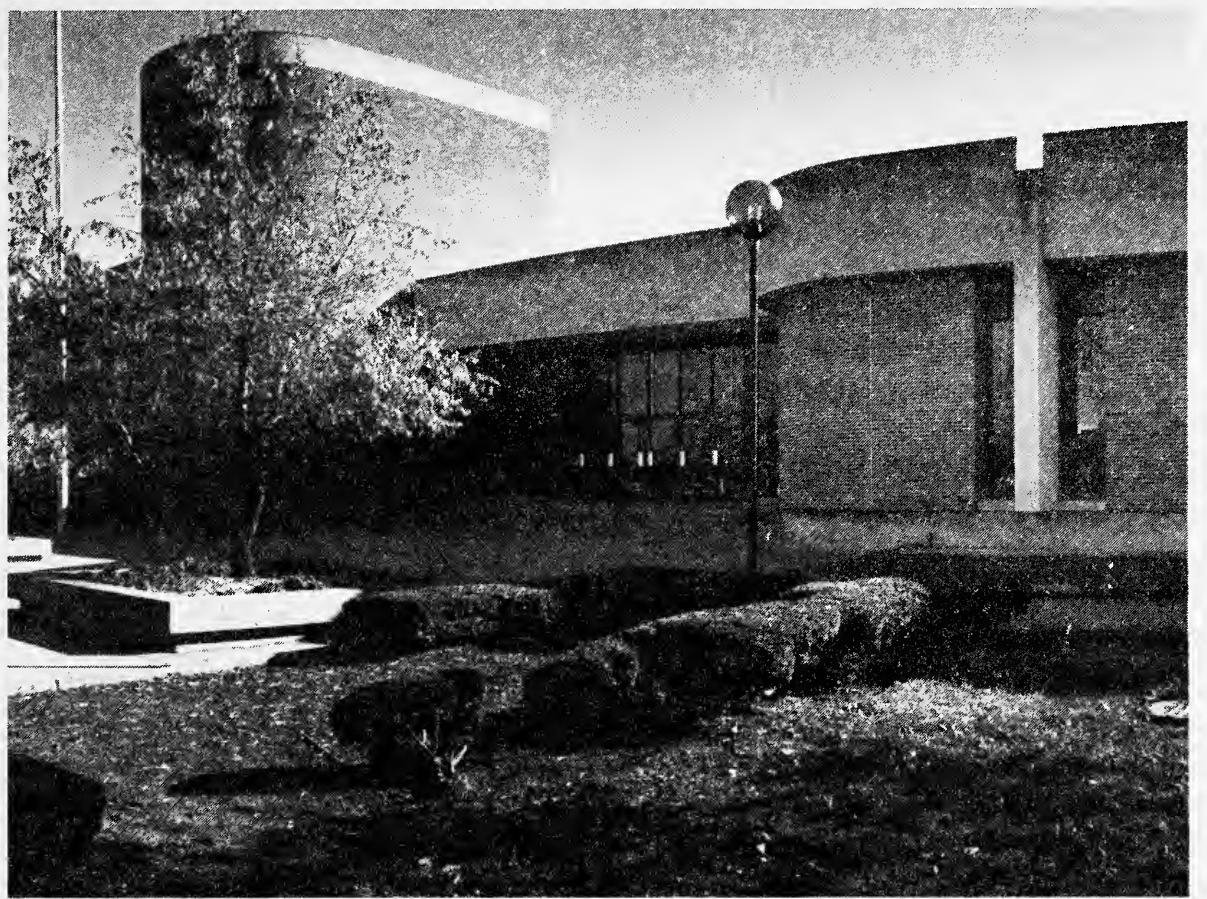
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1994-95

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DEDICATION

IN MEMORY OF R. BRUCE TOWNSEND

1917–1995

CLEON H. FOUST PROFESSOR EMERITUS OF LAW

DEBRA A. FALENDER*

This issue, the Twenty-Second Annual Survey of Recent Developments in Indiana Law, is dedicated to the memory of R. Bruce Townsend—teacher, scholar, colleague, and friend. R. Bruce Townsend passed away February 10, 1995, at his home in Fort Myers, Florida.

Born and raised in Garwin, Iowa, Bruce Townsend was one of six children. His father was a banker, and his mother was a teacher. He earned his A.B. degree from Coe College in 1938, studying money and banking. After a brief stint teaching law in Kansas City and then a not-so-brief stint in the United States Army Air Corps (1942-1945), where he served in the China-Burma-India theatre of operations and received the Air Medal and Distinguished Flying Cross, he arrived in Indianapolis in January 1946 to begin his very distinguished law teaching career. He remained a faculty member at the Indiana University School of Law in Indianapolis until his retirement in 1982.

During his years as a faculty member, he accomplished everything that a teacher and scholar could hope to accomplish. He published several widely read and very influential books, articles, and monographs. He was honored as the first recipient of an endowed professorship named after former dean and professor emeritus, Cleon H. Foust. He served on numerous state and federal commissions, many of which had extraordinary success in drafting and implementing successful and enduring state and federal legislation. For example, he served as a member of the National Conference of Commissioners on Uniform State Laws from 1965 until 1982, during which time the Uniform Commercial Code and the Uniform Consumer Credit Code were adopted in Indiana and throughout the country. As an Indiana Commissioner, Bruce and others wrote commentaries explaining the effect that these uniform laws would have if adopted in Indiana. Subsequently, after the Uniform Commercial Code was adopted, Bruce and others prepared and updated rules, forms, and procedures to be used for filings under the Code.

In the late 1960s, Bruce served as Reporter for the Indiana Civil Code Study Commission, helping to draft an Indiana Civil Procedure Code that was consistent with the Federal Rules of Civil Procedure. The Commission's Report totalled 367 pages and resulted in the adoption of the new rules by the Indiana General Assembly and the Indiana Supreme Court. A subsequent educational campaign helped lawyers understand and accept this important innovation. Bruce recently described this achievement as his "greatest adventure."

The professional accomplishments of which Bruce Townsend should be most proud were those related to his teaching and his students. At his retirement celebration, he was described as a "teacher extraordinaire," and those who were fortunate enough to have had him as a teacher can attest that this description is perhaps itself an understatement. He

* Professor of Law, Indiana University School of Law—Indianapolis.

frequently won the Black Cane Award, given each year by the students to the best teacher at the law school. He also frequently left his mark on his students. His message was most effective because it came from his heart and soul—in all that he did and said and stood for, he expected his students to think for themselves, to work hard, to admit mistakes, to take responsibility, to love the law, and to laugh, have fun, and celebrate life.

An elegant statement was made at his retirement in 1982: “[H]is unselfish commitment for four decades to provide knowledge and understanding has earned him the profound respect and admiration of three generations of students and lawyers.” A less elegant, but no less clear expression of respect and admiration was found in an annual golf tournament in his honor, which when last held in his name in the year he retired, attracted hundreds of student, faculty, and alumni golfers and well-wishers. Even more recently, another clear expression of widespread and deep respect and admiration has occurred with the extraordinary success the law school has had in garnering funding and support for the R. Bruce Townsend Endowed Professorship.

Bruce earned the profound respect of his colleagues in the law school, the university, and the legal community. Even with his peers, he was a consummate teacher and scholar. Every encounter with Bruce held the potential for becoming a rich intellectual exchange. He teased; he goaded; and with one or two probing questions, and a twinkle in his eye, he could turn your well-formed opinion upside down or inside out, and cause you to think about the matter at hand just a little bit differently.

Bruce Townsend was an ardent supporter of the *Indiana Law Review*. He wrote about the Law of Secured Transactions and Creditors’ Rights in the first ten Survey Issues, in volumes 7 through 16 from 1973 until 1982. In these articles, he criticized gently and he complimented enthusiastically, as the occasion demanded. For example, he described many judicial decisions as “excellent,” or “outstanding,” or “deserving of great praise.” But he described others as “unfortunate” and “ridiculously technical”; he complained when form was elevated over substance; and one year he said: “Judges need encouragement to do better.”

His professional accomplishments, his students, and his very special professional and personal friendships were important to Bruce, but not so important as his wonderful family—in particular his wife Rachel. Bruce and Rachel were married in 1945, when Bruce returned from the service. They have two children, William Townsend and Susan Maher, as well as seven grandchildren and five great-grandchildren. Bruce and Rachel loved and respected each other, and loved and appreciated life—in Bruce’s words: “Life has been good to us and we have enjoyed it all.”

There are many, many people whose personal and professional lives were touched by Bruce Townsend. There are those who recall fondly such endearing idiosyncrasies as Bruce’s hubcap collection (sometimes he retrieved one before it stopped rolling), or his memory for case citations rather than case names (he would refer to a relevant case as “176 Indiana 283”), or his irreverence (he spoke, for example, of “GAs” and “deadbeats”), or his artistic abilities (he drew unforgettable stick people, cars, and houses on the blackboard). Those who were lucky enough to know him will never forget him. And he will be missed.

DEDICATION

**IN MEMORY OF
R. BRUCE TOWNSEND**

1917–1995

CLEON H. FOUST PROFESSOR EMERITUS OF LAW

GERALD L. BEPKO*

The Indiana University School of Law—Indianapolis is a great institution of which we can all be proud, but not because of buildings or books in the library. It is great because it consists of an evolving culture of excellence, a colony of sophisticated thought, a family of ideas, and a community that shares important values.

Each of us has contributed in our own way to this institutional culture. We are like members of a basketball team who contribute to the overall success of our team in a variety of ways, leaving the institution a little different, and we hope a little better, for our having been part of it.

There has been no more important contributor to the Law School's evolutionary institutional success than R. Bruce Townsend, along with his partner and our dear friend, Rachel. In terms of what he did for our team, Bruce was our Michael Jordan.

In the best traditions of the academy, he made his impact by being a consummate teacher.

Of course, like all of us, he taught students—more than 4000 of them. Nearly half the members of the Indiana Bar at the time of his retirement had studied in his classes. He taught one of the first courses students took in law school—Remedies—and one of the last courses before they graduated—Securities. To some, these were the alpha and the omega of a good legal education. When Bruce was in one of his particularly empathetic and magnanimous moods, he would even acknowledge that there were a few courses in between that mattered.

But nobody ever did it better than Bruce. No one on our faculty earned such consistent respect or so much adulation from our students, who over and over again elected him the winner of the Black Cane—the symbol of the year's best teacher.

And he didn't stop teaching just because students had graduated. Once, in the early 1970s, while Doug Whaley and I were still officially designated as GA teachers, we were sitting in Bruce's office and watched him receive a phone call. (Incidentally, while some alumni may think that the trappings of Bruce's office were designed to put people at ease, I can tell you that, from the standpoint of young faculty members, his office, and its environment, were most intimidating.) The phone call was obviously from a recently graduated student, although we could hear only one side of the conversation. After exchanging pleasantries and listening for a few minutes, Bruce said, "Yes, and then the bank repossessed? Then you should read 340 N.E.2d 198, IC 26-1-9-504, and 15 *Indiana Law Review* 345. These readings should give you the answer you're trying to find." We then resumed our conversation among commercial law teachers, which consisted of Doug

* Vice President for Long-Range Planning, Indiana University; Chancellor, Indiana University-Purdue University Indianapolis; and Professor of Law. The following comments were made by Chancellor Bepko at the R. Bruce Townsend Memorial Service on Monday, June 5, 1995.

and me sitting at Bruce's knee, listening to him talk about our common subjects. Then the phone rang again. Another recent graduate was on the line. Bruce listened, and then said, "And then the bank repossessed? Stop! I can't talk to you because I just advised the other side."

The moral of this story is known to all of Bruce's alumni: If you were going to get advice from Bruce, do so as soon as possible.

He also taught his faculty colleagues. He taught us a standard of hard work. As a young law teacher, I remember working a half day on Saturdays, primarily because Bruce Townsend did so. He taught us integrity to our craft and to each other. He taught us that the reform of law was important. Bruce never asked to be admitted to practice in the state of Indiana because he wanted to be totally free to speak and write about law, which he did frequently. He was known throughout the nation for his work in writing the Uniform Commercial Code, and he was the best of mentors for young faculty. For example, he laid the foundation for me to become a member of the UCC Permanent Editorial Board.

And he was well known for his personal contribution to maintaining the rigor and depth, and correlated respectability, for part-time law study. This served thousands of students who found it necessary to work while they pursued their studies and created one of the defining characteristics of the school—offering the highest quality part-time program in the nation.

He also taught us perspective, often with his thoroughly well-developed sense of humor. He taught us to love our school and all the people in it, just as he loved it so passionately. Later, I came to wonder if his sense of perspective and his love of our school may have derived in part from his wartime experience. In an article in the Sunday *Indianapolis Star* magazine in 1981, in which Bruce was called the "Wizard of West New York Street," he talked about his experiences flying the hump in China and was quoted as saying, "We lost a lot of airplanes and pilots. When they figured you should have been dead, they gave you the Air Medal. When you should have been dead twice, they gave you the Distinguished Flying Cross." Bruce received both.

In living out his perspective on life among us, he taught us the joy of devoting ourselves to what must be the most satisfying, fulfilling professional life—the task of providing optimal learning conditions for a wonderfully talented group of students trying to learn the law.

Finally, Bruce taught us by his own example. While he was a giant of our legal community, he was, perhaps most importantly, a truly decent and honorable man. He was a meticulously honest, sincere, devoted, loving, compassionate human being. These qualities had an impact on most of us individually and, if you look closely, they can be found at the very core of the foundations on which the greatness of the School of Law has been built. For this we will be everlastingly grateful because the qualities that make our school great will always reflect our love for Bruce, his memory, and all of his wonderful family.

ON LAWYERS AND WRITING: PASS THE CONSTITUTIONAL MUSTARD, PLEASE

RANDALL T. SHEPARD*

In an age of information overflow, we too easily forget the power of words.

I was reminded of that power last year when a friend invited me to visit her class of fifth graders during national reading week. She asked me to talk with her students about what reading had meant to me. She also requested that I bring along something to read aloud.

Finding the right thing to read to ten-year-olds seemed daunting, until I found a book of famous statements and writings on the shelf at home. I do not remember ever buying or receiving this book, but a quick survey of its contents solved my problem. I found several short pieces that I enjoyed reading myself and enjoyed reading to fifth graders, talking with them about who wrote each one and why the words were important.

I chose first the opening paragraphs of the Declaration of Independence. Written by Thomas Jefferson, these words have moved men and women around the world since 1776. The modern reader might find Jefferson's introduction a little long, but what would you leave out?

When, in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Government long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present

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King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.¹

Moving along chronologically, I chose a shorter message, a mere two lines by Abraham Lincoln. Many Americans would recognize the first sentence, but the simple beauty of Lincoln's prose is apparent only when one reads the whole statement: "I believe this government cannot permanently endure half slave and half free. I do not expect the Union will be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided."² Shakespeare rarely turned a better phrase.

Finally, I chose a passage from Longfellow which was employed under historic circumstances. It seems that during the dark, early days of World War II, President Franklin Roosevelt gave Wendell Willkie, his opponent in the 1940 presidential election, a hand-written letter of introduction for presentation to Winston Churchill. Roosevelt included Longfellow's poetry as a message of encouragement to the British:

Sail on, O Ship of State!
Sail on, O Union, strong and great!
Humanity with all its fears,
With all its hopes of future years,
Is hanging breathless on thy fate!³

During a speech in February 1941, Churchill told the story of receiving FDR's message. No mean wordsmith himself, Churchill mused publicly about what response he should give to the President. In doing so, he delivered one of the most famous lines of the war: "Put your confidence in us. Give us your faith and your blessings and, under Providence, all will be well. Neither the sudden shock of battle, nor the long-drawn trials of vigilance and exertion will wear us down. Give us the tools and we will finish the job."⁴

Famous words like these have had a profound impact on the course of history. The words we lawyers generate while plying our trade are likewise serious of purpose, and they too can make a difference in the lives of our fellow citizens. Contemplate, for example, the results of words written and uttered by lawyers in litigating *Brown v. Board of Education*.⁵

THERE IS ROOM FOR WHIMSY

On the other hand, lawyers can sometimes produce words designed for entertainment, fun, and frolic. Former I.U. Dean Douglass Boshkoff recently published a series of limericks about the law of contracts, editing the work of a student of the law who knew

1. THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776).

2. Abraham Lincoln, Speech at Republican State Convention, Springfield, Illinois (June 19, 1858), in JOHN BARTLETT, FAMILIAR QUOTATIONS 635 (14th ed. 1968).

3. Winston Churchill (British Broadcasting Corporation worldwide radio broadcast, Feb. 1941), in JAMES C. HUMES, THE WIT AND WISDOM OF WINSTON CHURCHILL 124 (1994).

4. *Id.*

5. 349 U.S. 294 (1954).

and revered the famous Professor Williston.⁶ Any lawyer with a playful mind will find them great reading. I share here three of these light-hearted rhymes about well-known cases of the sort I remember from my own experience as a student in Contracts 101.

One of the Boshkoff limericks tells the story of *Mitchill v. Lath*,⁷ a New York Court of Appeals case about the parol evidence rule. The court held that the rule prevented testimony concerning an oral promise by the seller of real estate to remove an ice house on the adjacent lot.⁸ The poetic version came out like this:

The writing gave nary a clue
As to what the seller must do.
So, like it or not,
In that very same spot
Is the ice house, still blocking the view.⁹

Reading the verse about *Hawkins v. McGee*¹⁰ brought back fond law school memories. Is there anybody who can forget learning about the “hairy hand” case? Dr. McGee solicited the opportunity to operate on Hawkins’ hairy hand and promised “to make the hand a hundred per cent perfect hand.”¹¹ Unfortunately, the operation was unsuccessful. The New Hampshire Supreme Court decided that the doctor could properly be held liable for breach of contract,¹² and concluded that the value of the expectancy, not reliance, was the proper measure of damages.¹³ Boshkoff managed to tell this story by only hinting at the condition of the hand:

A terrible need for a fee
Brought great grief to Doctor McGee.
And his promises airy
Led a patient unwary
To a hand that no mortal should see.¹⁴

A third rhyme told the story of the famous case on foreseeable damages, *Hadley v. Baxendale*.¹⁵ An English court held that a carrier of goods was not liable to the shipper

6. Douglass G. Boshkoff, *Selected Poems on the Law of Contracts*, 66 N.Y.U. L. REV. 1533 (1991). Despite countless clerk research hours devoted to tracing the poems’ authorship, the identity of Boshkoff’s “student” has apparently been lost to the ages. This exhaustive search for clues left yet uncovered in the stacks of the Raintree County Library proved fruitless, though a delightful exercise nonetheless.

7. 160 N.E. 646 (N.Y. 1928).

8. *Id.* at 648.

9. Boshkoff, *supra* note 6, at 1544.

10. 146 A. 641 (N.H. 1929).

11. *Id.* at 642-43.

12. *Id.* at 643.

13. *Id.* at 644.

14. Boshkoff, *supra* note 6, at 1542.

15. 156 Eng. Rep. 145 (Ex. Ch. 1854). My law school classmates and I were so enamored of this case that we commonly referred to a well-known New York firm as “Millbank, Tweed, Hadley & Baxendale.”

for profits he lost after a delay in shipping because those damages were not reasonably foreseeable at the time the parties made their contract.¹⁶ The poetic version reads:

There once was a young man named Hadley
Whose contract of transport went badly.
“My mill shaft is gone,
All my goods are in pawn,
And my business is closed,” he said sadly.¹⁷

These are good fun and we certainly have light moments while practicing law.¹⁸ But alas, most of law is not literature. And much of what we lawyers say to each other about the decline of legal writing, including calls for more piquant prose or more dramatic pacing misses the mark.¹⁹ Still, those who focus on legal craftsmanship are correct to observe that good writing is widely undervalued.²⁰ This is not to say that polished prose goes unappreciated. Most of us—inside and outside the legal profession—prefer reading ideas clearly and concisely presented, and we recognize the difficulty of extracting meaning from poorly presented thoughts. Notwithstanding the preeminence of written communication skills among the tools of our craft, however, we too often think of finely-tuned written work product as more luxury than necessity.

CARELESS WRITING EXACTS A TOLL

In part, we undervalue good writing because we overlook the potential injurious effects of bad writing. Dean Bryant Garth deftly identified the downside risk in a recent panel discussion for the American Bar Association billed as “Bad Legal Writing Is Not a Victimless Crime.” I thought of this title a few months back during a conversation with a very capable lawyer, Shirley Shideler, who recently retired from Barnes & Thornburg. She told me with some pride that the lawyers in the trust and estates section of her firm had long believed that there should not be a division of labor between those who prepare the legal instruments and those who administer the estates and trusts created by them. “We’ll always be better writers if we know we will have to live with the documents we prepare,” she said.

16. *Id.*

17. Boshkoff, *supra* note 6, at 1542.

18. I put in a plug here for the entertaining work of my friend Justice Hecht of the Texas Supreme Court. See Nathan L. Hecht, *Extra-Special Secrets of Appellate Brief Writing*, 3 SCRIBES J. LEGAL WRITING 27 (1992) (“It is impossible to exaggerate the importance of having the right color [brief cover], since that is how the Court decides who wins.”).

19. See REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING § 1.1, at 2 (2d ed. 1986) (“So long as drafting is considered solely a search for the accurate and felicitous phrase, many a vigorously practical lawyer will continue to think of it as the kind of exercise that can safely be minimized when the going gets tough.”).

20. See Robert Sack, *Hearing Myself Think: Some Thoughts on Legal Prose*, 4 SCRIBES J. LEGAL WRITING 93 (1993); see also George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333 (1987).

Being a better writer requires real effort and there really are no substitutes for time, care, and thought. I once heard a speaker commence his address by telling the audience, "Before I begin my speech, there are a few things I'd like to say." This was purely the result of not thinking, not connecting with the situation, and plunging ahead anyway. That is more or less what the lawyer did who submitted a brief to our Court in which he defended a particular statute by telling us that it "clearly passes constitutional mustard." Honest.

Neither pen nor keyboard should ever be utilized without first making sure the brain is fully engaged. This is not to say that every first draft must be a matter of great labor. I frequently find it productive to begin by brainstorming on paper—writing down every idea I have on the subject, as fast as I can—in the preliminary stages of a writing project. Professor James McElhaney advocates this technique and observes: "At this point there are no good ideas or bad ideas—there are just ideas. If you reject something now because it's a bad idea, you will cut off the train of thought that might have led to a new insight or a telling argument."²¹ Under the most fortunate circumstances, a first draft comes flooding out of you almost on its own. As Judge Pat Wald says, "I seem to have no real control over what initially comes out. Thoughts, doubts, problems surface that I had not thought about before I sat down to write."²²

It is certainly important to focus what energy we have on the most productive activities. I agree with Professor George Gopen that far too often we proceed on the mistaken belief that all the thinking attendant to producing written work product—conceiving strategies, conducting research, organizing the approach to be taken, and distilling the input of others—takes place before the fingers touch the keyboard.²³ Conventional wisdom, as well as more than a few writing manuals, suggests that if you devote your energies to developing a clear blueprint, the construction of the piece takes care of itself. How many law clerks, associates, judges and partners accordingly focus their attention on literary site preparation? Preparing to write is certainly important and planning is usually worth the effort, but it is in the execution of the plan that our intellects must be most engaged if we hope to produce a commendable final product. "The writing process is not to be separated from the thinking process; it is a thinking process."²⁴

THERE IS ONLY GOOD REWRITING

Besides thinking, the only reliable way to improve something we have written is to write it again. I find that decent opinions of even the most modest sort require four drafts before they are ready to show the world. Really important work requires seven or eight drafts. Even then, I am often astonished at how much room for improvement there is if one has the time to do yet another revision. In short, as former Judge Thomas Gibbs Gee has said, "There is no good writing, only good rewriting."²⁵ Clear, simple writing "takes a lot of work, and a lot of rewriting, to remove the layers of dirt, smoke, and old varnish

21. James W. McElhaney, *How I Write*, 4 SCRIBES J. LEGAL WRITING 39, 42 (1993).

22. Patricia M. Wald, *How I Write*, 4 SCRIBES J. LEGAL WRITING 55, 55 (1993).

23. Gopen, *supra* note 20, at 343.

24. Gopen, *supra* note 20, at 343.

25. Thomas Gibbs Gee, *How I Write*, 4 SCRIBES J. LEGAL WRITING 7, 8 (1993).

that congeal around the prose."²⁶ Yet what beautiful and powerful expression would otherwise remain hidden without the effort.

When discussing the mechanics of writing, writing teachers sometimes sound like astronomical physicists describing the process in terms oddly consonant with theories about the formation of the universe. We start with the proverbial (Kingsfieldian?) skull full of mush and word by word distill into communicable form our fog of thoughts, theories, impressions, hunches and notions. Out of the primordial soup comes solid matter: the ideas on which intellectual discourse is based and with them the potential to influence the actions and ideas of others.

Still, I join with writing teachers in the belief that good writing can be both taught and learned. We know a fair amount about how and where that can occur. In a recent poll, interviewers asked Illinois lawyers where each had learned how to be a legal writer. The results were confirming:

Repeated experience	75%
Other lawyers	69%
Law school curriculum	50%
Law review	14% ²⁷

I do not take the last number on this list as a demonstration that law journals are a bad place to learn writing. It likely reflects that most lawyers did not have law journal experience. The Illinois poll also provided evidence that some law schools are more effective than others at teaching their students how to write. When asked whether they had learned writing while in law school, the Illinois lawyers gave dramatically different answers, such as:

Chicago-Kent	67%
John Marshall	44%
Chicago	20% ²⁸

The annual Survey issue of this journal shows a commitment by the school and its students to continuing scholarship and to written expression. It is not an accident that America's law journals are a considerable source of intellectual fodder for litigation and legislation.

Part of the challenge confronting lawyers as writers stems from the nature of our profession. Legal writing serves a very different function from the writing of such other non-fiction disciplines as medicine or engineering. Much of our work product must be accessible to lay readers as well as to professional audiences, creating special problems when it comes to the use of technical terms.²⁹ Readers also care about specifics: who did

26. Lawrence M. Friedman, *How I Write*, 4 SCRIBES J. LEGAL WRITING 3, 5 (1993).

27. Bryant G. Garth, Panel presentation at the American Bar Association Annual Meeting (Aug. 5, 1993), in *Lost Words: The Economic, Ethical and Professional Effects of Bad Legal Writing*, 1994 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO B., OCCASIONAL PAPERS 7, at 9.

28. *Id.*

29. "To be of any use, the language of the law (as any other language) must not only express but convey thought. With communication the object, the principle of simplicity would dictate that the language used by lawyers agree with the common speech, unless there are reasons for a difference." DAVID MELLINKOFF, THE

what to whom. Yet, the lawyer's need to focus on objective rules tends to divert attention from the subjective details of each legal story. Our focus on legal rules fits the needs of the academy or the courts and the law firms, but the underlying facts matter a great deal to most clients and to the larger audience frequently affected directly by the words we choose.

In this democracy, especially with adversarial advocacy a cornerstone of our legal system, we rely on the marketplace of ideas to help sort fact from fiction, good ideas from bad. While I have great respect for the strength of the spoken word, I think that really good ideas come from writing rather than from speaking. Oral communication provides a more direct link to the recipient, and a skilled orator knows how to reach both head and heart. His words pack a more immediate wallop, but no medium can convey the sweeping power of ideas as can the written word. The most effective means of exchange in this marketplace is the written word.

Not only is text less ephemeral, lingering on the page for repeated perusal and accessible to future audiences, but the prospect of lasting scrutiny imbues the writing enterprise with a seriousness which, even for light pieces, militates against too casual an approach. The very laboriousness of writing carefully mandates clearer thinking. "Expository writing not only reflects thought, but helps shape it."³⁰ Concisely articulating one's thoughts on paper requires a greater degree of attention to detail, not to mention linguistic discipline, and in the process the ideas represented invariably emerge truer for the effort. Judge Edith Jones succinctly expressed the writer's calling as follows: "I persist in believing not only that ideas have consequences, but also that one cannot communicate ideas except by writing well. To these ends, I write. *Ad astra per aspera.*"³¹

"BE READY FOR THE END"

The power of the thinking which approaches us through good writing can hardly be underestimated. Professor Calvin Woodard recently supplied me with an uncommonly elegant expression of the excitement and expectation that can arise in a writer who has done something important. In an 1886 lecture to Harvard undergraduates, Oliver Wendall Holmes said:

No man has earned the right to intellectual ambition until he has learned to lay his course by a star which he has never seen—to dig by the divining rod for springs which he may never reach. In saying this, I point to that which will make your study heroic. For I say to you in all sadness of conviction, that to think great thoughts you must be heroes as well as idealists. Only when you have worked alone—when you have felt around you a black gulf of solitude more isolating than that which surrounds the dying man, and in hope and in despair have trusted to your own unshaken will—then only will you have achieved. Thus only can you gain the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard

LANGUAGE OF LAW, preface (1963).

30. DICKERSON, *supra* note 19, at 354.

31. Edith Hollan Jones, *How I Write*, 4 SCRIBES J. LEGAL WRITING 25, 29-30 (1993).

of him will be moving to the measure of his thought—the subtle rapture of a postponed power, which the world knows not because it has no external trappings, but which to his prophetic vision is more real than that which commands an army. And if this joy should not be yours, still it is only thus that you can know that you have done what it lay in you to do—can say that you have lived, and be ready for the end.³²

Knowing we will often fail, even on our best days, we should all aspire to be such writers.

32. G. Edward White, *Holmes's "Life Plan": Confronting Ambition, Passion, and Powerlessness*, 65 N.Y.U. L. REV. 1409, 1430-31 (1990) (quoting THE OCCASIONAL SPEECHES OF JUSTICE HOLMES 28-31 (M. Howe ed., 1962)).

RECENT DEVELOPMENTS IN INDIANA CRIMINAL LAW AND PROCEDURE

HONORABLE GARY L. MILLER*
KELLY ROTA-AUTRY**

INTRODUCTION

This Article will focus on some recent developments and cases concerning criminal law that have been addressed by the Indiana appellate courts since the last Survey and will detail statutes created and modified by the 1994 Indiana General Assembly.

I. 1994 LEGISLATIVE ACTS

The 1994 Indiana General Assembly created a host of new statutes in the areas of sex offenses, gun possession, and sentencing guidelines.

A. Sex Offenses

The murder of twelve-year old Zachary Snider¹ in 1993 by an individual who was on probation for a prior child molest conviction directed a great deal of media attention to the issue of returning convicted sex offenders to the community after they serve their sentences. The General Assembly addressed the concerns about probation for these offenders and protection for potential future victims in several significant ways.

First, the General Assembly created a "sex offender registry." It is administered through the Indiana Criminal Justice Institute and maintained in cooperation with Family and Social Services.² The statute defines a sex offender³ as "a person who commits rape if the victim is less than eighteen,⁴ criminal deviate conduct if the victim is less than eighteen,⁵ child molesting,⁶ child exploitation,⁷ vicarious sexual gratification,⁸ child solicitation,⁹ child seduction,¹⁰ and incest if the victim is less than eighteen."¹¹ The law

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1. See *Body of Cloverdale Boy Found; Neighbor Faces Murder Charge*, INDIANAPOLIS STAR, July 22, 1993, at A1.

2. IND. CODE §§ 5-2-12-1 to -13 (Supp. 1994).

3. *Id.* § 5-2-12-4.

4. *Id.* § 35-42-4-1.

5. *Id.* § 35-42-4-2.

6. *Id.* § 35-42-4-3.

7. *Id.* § 35-42-4-4(b).

8. *Id.* § 35-42-4-5.

9. *Id.* § 35-42-4-6.

10. *Id.* § 35-42-4-7.

11. *Id.* § 35-46-1-3.

requires sex offenders to “register with each local law enforcement authority having jurisdiction in the area where the offender resides . . . for more than seven days,”¹² and makes it a class A misdemeanor to knowingly or intentionally fail to register.¹³ Correctional facilities are required to advise committed sex offenders of their duty to register.¹⁴

Civil libertarians have questioned the statute, particularly the section that requires the Criminal Justice Institute to send an updated list of sex offenders to all schools and child care facilities in the state and to send the list to *any* other entity that provides services to children, if the entity requests a copy of the register.¹⁵ The law also requires that a warning accompany the registry list, informing entities who employ a person on the list that continuation of such employment “may result in civil liability for the employer.”¹⁶ Additional statutes require the termination of offenders who are state employees and who work with or around children¹⁷ and mandate the revocation of a teaching license of anyone *ever* convicted of such an offense.¹⁸ Therefore, it is extremely important that the practitioner advise a client who may be deemed a “sex offender” of the significant ramifications of a guilty plea or a finding of guilt on these charges. Judges, too, should consider these statutes when they determine the voluntariness of a plea, especially in order to avoid later problems with post-conviction relief petitions.

In the area of probation, Indiana Code section 35-50-2-2¹⁹ was amended to *require* that the court place a sex offender on probation for not more than ten years and provides that the parole board place a parole-eligible sex offender on parole for not more than ten years.²⁰ This amendment not only lengthens the period of time that a probation or parole officer can monitor an individual who has committed a sex offense, but it also extends the time that the offender may be on the newly created sex offender registry. The new statute also allows that while on probation, the court is authorized to require a sex offender to participate in court-approved sex offender treatment programs and to avoid contact with persons under sixteen years of age, unless the offender receives prior court approval or successfully completes the treatment program.²¹

Effective July 1, 1994, the General Assembly amended the child molesting statutes by increasing the maximum age of the victim from twelve to fourteen years old.²² In addition, the General Assembly created a completely new statute entitled “Sexual Misconduct With A Minor,” which prohibits sexual intercourse, deviate sexual conduct, and touching or fondling by a person eighteen years of age or older with a child at least

12. *Id.* § 5-2-12-5.

13. *Id.* § 5-2-12-9.

14. *Id.* § 5-2-12-7.

15. *Id.* § 5-2-12-11.

16. *Id.* § 5-2-12-12.

17. *Id.* § 4-13-2-14.7.

18. *Id.* § 20-6.1-3-7(b).

19. *Id.* § 35-50-2-2.

20. *Id.* § 35-50-2-2(e).

21. *Id.* § 35-38-2-2.4.

22. *Id.* § 35-42-4-3.

fourteen but less than sixteen years of age.²³ This statute substantially changes the description of the offense for those adults involved in sexual activities with fourteen or fifteen year olds, because a conviction will no longer brand them as child molesters but instead will label them with a less stigmatizing description: sexual misconduct with a minor. The General Assembly also increased the penalty for incest from a class D to a class C felony²⁴ and changed the child solicitation crime to a class D felony, rather than a class A misdemeanor.²⁵

There were several changes in the child hearsay statute, which determines whether out-of-court statements or video tape may be admitted as substantive evidence in criminal trials.²⁶ The new statute provides that mental health experts may testify if the protected person, generally a child, is unavailable as a result of a substantial likelihood of emotional or mental harm. The new provision also requires the court to render a finding that the testimony of the protected person "will cause the protected person to suffer serious emotional distress such that the protected person cannot reasonably communicate."²⁷ Second, the out-of-court statement or video tape may be admitted into evidence *only* if the protected person was available for cross-examination either at the hearing on availability or when the statement or video tape was made.²⁸ Finally, when the statement or video tape is admitted, the court is obliged to

instruct the jury that it is for the jury to determine the weight and credit to be given the statement or video tape and that, in making that determination, the jury shall consider the following:

- (1) The mental and physical age of the person making the statement or video tape.
- (2) The nature of the statement or video tape.
- (3) The circumstances under which the statement or video tape was made.
- (4) Other relevant factors.²⁹

The General Assembly also amended the Code section that allows testimony by a protected person outside the courtroom.³⁰ The amendment allows the court to require that closed circuit television testimony be "two-way" and allows the protected person to see the accused and the trier of fact. The closed circuit testimony also may allow the accused and the trier of fact to see and hear the protected person (even if the testimony is video taped for use at trial).³¹ The amendment requires testimony from a psychiatrist, physician, or psychologist and any other evidence available to establish that if the protected person testifies in the physical presence of the defendant, the protected person would suffer

23. *Id.* § 35-42-4-9.

24. *Id.* § 35-46-1-3.

25. *Id.* § 35-42-4-6.

26. *Id.* § 35-37-4-6.

27. *Id.* § 35-37-4-6(d)(2)(B)(i).

28. *Id.* § 35-37-4-6(e).

29. *Id.* § 35-37-4-6(g).

30. *Id.* § 35-37-4-8.

31. *Id.* § 35-37-4-8(c).

serious emotional harm.³² Additionally, the court must find that the protected person could not reasonably communicate to the trier of fact in the presence of the defendant.³³ The General Assembly also changed the required method of determining the emotional or mental harm to the protected person from “testifying in the courtroom” to “testifying in the physical presence” of the defendant.³⁴ Finally, the amendment limits those persons who may be present when the protected person gives live, closed-circuit testimony to: the defense attorney (if the defendant is represented by one), the prosecuting attorney, a bailiff or other court representative, any person necessary to operate the video equipment, and any person whom the court finds will contribute to the protected person’s well being.³⁵

B. Guns

Guns became an important topic in the General Assembly this year. Several high profile cases involving young children with guns prompted the creation of new laws. A new chapter of the Criminal Code, entitled *Children and Handguns*,³⁶ was created that established several new offenses. A new crime called “Dangerous Possession of a Handgun” makes it illegal for a child under the age of eighteen to possess a handgun or to provide a handgun to another child.³⁷ “An adult who knowingly, intentionally or recklessly provides a handgun to a child,” commits the new offense of “Dangerous Control of a Handgun.”³⁸ Finally,

[a] child’s parent or legal guardian who knowingly, intentionally or recklessly permits the child to possess a handgun:

(1) while:

(A) aware of a substantial risk that the child will use the handgun to commit a felony; and,

(B) [failing] to make reasonable efforts to prevent the use of [the] handgun by the child to commit a felony,

commits “Dangerous Control of Child.”³⁹ Parents also may be subject to criminal penalty under this section if their “child has been convicted of a crime of violence or has been adjudicated as a juvenile for an offense that would constitute a crime of violence if the child were an adult.”⁴⁰ This is a class C felony, which may be enhanced to a class B felony if the parent or guardian has a prior conviction under this section.⁴¹ The statute also mandates a five-day consecutive sentence without good time credit⁴² and mandates

32. *Id.* § 35-37-4-8(e)(1)(B)(iii).

33. *Id.* § 35-37-4-8(e)(1)(B)(i).

34. *Id.* § 35-37-4-8(e)(1)(B)(iii).

35. *Id.* § 35-37-4-8(f).

36. *Id.* §§ 35-47-10-1 to -10.

37. *Id.* § 35-47-10-5.

38. *Id.* § 35-47-10-6.

39. *Id.* § 35-47-10-7(1).

40. *Id.* § 35-47-10-7(2).

41. *Id.*

42. *Id.* § 35-47-10-8.

consecutive sentencing for those who violate Indiana Code section 35-47-2-7 for illegally transferring ownership or possession of a handgun.⁴³ The General Assembly also made it a class C felony to possess a firearm in or on school property⁴⁴ and a class C felony to “sell, give or in any other matter transfer the ownership or possession of a handgun or assault weapon to any person under [eighteen] years of age.”⁴⁵

The other major change regarding weapons was an amendment that increased the penalty for possession of a handgun without a license from a class D felony to a class C felony if the defendant has a prior conviction of possession of a handgun without a license or has been convicted of a felony within fifteen years before the date of the offense.⁴⁶ Considering the apparent increase in the number of handguns in our society, this change may substantially increase the caseload of courts in urban areas, as well as overwhelm the capacity of local jails and community corrections programs, ultimately multiplying the inmate population at the Department of Corrections.

The General Assembly enacted a sentencing enhancement for any offense in which a person uses an assault weapon during the commission of the offense.⁴⁷ An assault weapon is defined as “a firearm that shoots automatically more than one (1) shot without manual reloading by a single function of the trigger.”⁴⁸ If the State proves that an assault weapon was used, the statute requires that the court sentence the offender to an additional term of imprisonment of not less than the presumptive sentence for the underlying offense and not more than twice the presumptive sentence for the underlying offense, not to exceed ten years.⁴⁹

C. Sentencing

The General Assembly amended the Indiana Code to provide that after July 1, 1994, the presumptive sentence for murder shall be fifty years instead of forty, with no more than ten years, rather than twenty, added for aggravating circumstances, and not more than ten subtracted for mitigating circumstances.⁵⁰ Thus, the range for murder is now forty to sixty years. In addition, the General Assembly amended the class A felony sentence range to provide that the presumptive sentence be twenty-five years, rather than thirty. The statute did not change the twenty-year maximum enhancement for aggravating circumstances; therefore, the maximum term of imprisonment is lowered from fifty years to forty-five. However, mitigating circumstances can decrease the penalty by ten years, making the range for a class A felony from fifteen to forty-five years.⁵¹

With regard to sentencing, the General Assembly not only attempted to comply with public pressure for a “three strikes and you’re out” statute, but it also created a life without parole statute that appears to conflict with an amendment to the habitual offender

43. *Id.* § 35-47-10-9.

44. *Id.* § 35-47-2-23.

45. *Id.* § 35-47-2-7.

46. *Id.* § 35-47-2-23.

47. *Id.* § 35-50-2-11.

48. *Id.* § 35-50-2-11(a).

49. *Id.* § 35-50-2-11(c).

50. *Id.* § 35-50-2-3.

51. *Id.* § 35-50-2-4.

statute. The “life without parole” statute provides that when a person is charged with one of the felonies for which the minimum sentence is not suspendable (listed as Indiana Code section 35-50-2-2(b)(4)) and the defendant is also alleged, in a separate page of the charging instrument, to have two prior unrelated felony convictions from the list of non-suspendable offenses, the allegations are to be tried in a bifurcated proceeding, as required in the habitual criminal offender statute. If the trier of fact finds that the person has two prior unrelated convictions, the court *may* sentence the defendant to life imprisonment without parole.⁵² The General Assembly also modified the habitual offender statute to require that if all three felony convictions are for the crimes of murder, battery, aggravated battery, criminal recklessness, confinement, kidnapping, sex offenses, robbery, carjacking, or arson, then the offender would be deemed a “violent” habitual criminal and sentenced to an additional term of life imprisonment. It appears that the court may have the discretion to sentence one charged as a habitual offender under Indiana Code section 35-50-2-8 to a maximum of thirty years rather than life without parole.⁵³ Thus, Indiana now has three types of habitual offender statutes: one that adds a specific term of years pursuant to section 35-50-2-8(c); one that allows the court to impose a sentence of life without parole under section 35-50-2-8.5; and one that mandates life imprisonment under section 35-50-2-8(f).

The General Assembly also made an effort to curb gang violence by amending Indiana Code section 35-50-2-9 to add two aggravating circumstances to support the death penalty. The aggravating factors are: (1) committing murder by intentionally killing the victim while committing or attempting criminal gang activity; and, (2) committing murder by intentionally discharging a firearm into a inhabited dwelling or from a vehicle.⁵⁴

However, the General Assembly softened its position on the death penalty by acknowledging that the death penalty should be precluded for persons determined to be “mentally retarded.”⁵⁵ A “mentally retarded” person is one “who before becoming twenty-two (22) years of age manifests: (1) significantly subaverage intellectual functioning; and (2) substantial impairment of adaptive behavior” as documented in a court-ordered evaluation.⁵⁶

Other legislative amendments give the trial court the discretion to impose consecutive sentences for offenses not joined in the same prosecution. However, the ability of the court to impose consecutive sentencing of felony offenses arising out of one episode is limited to the presumptive sentence for a felony one class higher than the highest class felony for which the person has been convicted arising out of the single episode.⁵⁷ Thus it appears that, absent the death penalty request, habitual enhancement, or life without parole enhancement, the maximum sentence for the most heinous of offenses arising out of the same episode is 110 years. If, for example, a defendant commits more than two murders he could only be sentenced to 110 years; the statute limits sentencing for the first murder to sixty years consecutive to the presumptive fifty years for the second murder.

52. *Id.* § 35-50-2-8.5.

53. *Id.* § 35-50-2-8(f).

54. *Id.* § 35-50-2-9(b)(1)(I), (b)(14).

55. *Id.* § 35-36-9-6.

56. *Id.* § 35-36-9-2.

57. *Id.* § 35-50-1-2.

Every other offense arising out of the same episode must be served concurrently. If a person were convicted of more than three class A felonies, that person could serve no more than ninety-five years; forty-five years on the first A felony, forty-five years on the second and five years on the third. As a result, Indiana trial judges will not be permitted to order extraordinarily lengthy sentences in the future.

II. CASE DEVELOPMENTS

A. *Disorderly Conduct and Free Speech*

Since the Indiana Supreme Court rendered its decision in *Price v. State*,⁵⁸ several appellate court decisions have discussed the issue of criminal liability and free speech. In *Price*, Chief Justice Shepard of the Indiana Supreme Court reasoned that although the Indiana Constitution permitted the exercise of police power to promote the "health, safety, comfort, morals, and welfare, of the public,"⁵⁹ the State may not "punish expression when doing so would impose a material burden upon a core constitutional value."⁶⁰ After examining the free expression clause of the Indiana State Constitution, the court found that Price's conviction for "noisy protest"⁶¹ of police conduct "implicates this [free speech] core value"⁶² and concluded that the protest was not an "intrusion upon the interests of others which [the Indiana Code] was designed to remedy."⁶³ The court held that "political expression becomes 'unreasonably noisy' for purposes of [the Indiana Code] when and only when it inflicts upon determinant parties harm analogous to that which would sustain tort liability against the speaker."⁶⁴ Although Price's volume was described by the officer as "very loud,"⁶⁵ the court held that the length of time between Price's "noisy protest" and the harm that was suffered by neighbors leaving their houses to observe the scene had not been established because of the large number of officers and civilians in the alley and the commotion that had arisen before Price arrived.⁶⁶ Therefore, the disorderly conduct conviction was reversed.

In *Radford v. State*,⁶⁷ a conviction for disorderly conduct was reversed when the defendant loudly protested police "harassment"⁶⁸ and refused a police officer's request to see the contents of a box she was carrying. Radford's employment with the Indiana University hospital had been terminated and a report had been made to the Indiana University Police Department that she was improperly removing hospital property. The officer confronted Radford and asked her to move out of the hospital hallway, at which time Radford raised her voice. Radford was asked to quiet down at least three times, but

58. 622 N.E.2d 954 (Ind. 1993).

59. *Id.* at 959.

60. *Id.* at 960.

61. *Id.* at 963.

62. *Id.*

63. *Id.* at 964.

64. *Id.*

65. *Id.*

66. *Id.*

67. 627 N.E.2d 1331 (Ind. Ct. App. 1994).

68. *Id.* at 1332.

she refused and “continually got angry and in a very loud and abusive voice.”⁶⁹ In reviewing the conviction, the court noted police officer Leslie Mumford’s testimony that “Radford ‘very loudly complained about being hassled by Officer Leslie.’”⁷⁰ This evidence was deemed indistinguishable from the defendant’s “very loud” objection in *Price*, declared by the Supreme Court as political speech. In reversing the conviction, the court found that “Radford’s speech . . . protested the legality and appropriateness of police conduct. Therefore, like the speech of Price, Radford’s speech was political speech . . . [which] at most comprised a public nuisance and [] did not inflict upon a determinant party any harm analogous to that which would sustain tort liability.”⁷¹

Judge Staton, in a well-reasoned dissent, said that the majority misapplied *Price*. He noted that an examination of the forum employed by Radford indicated that her speech was “abusive and intrusive. Her remarks were not political in nature. Her remarks were those of [a] person avoiding discovery of wrong doing—defensive and repelling.”⁷² In contrasting *Price*, he concluded that the difference in location and circumstances between Price and Radford required an examination of the intrusiveness of the harm and abuse in the particular forum.⁷³

Judge Staton reiterated this opinion when he wrote the unanimous affirmation of the disorderly conduct conviction in *State v. Stites*.⁷⁴ In *Stites*, police were called to the scene of an argument involving seven people. All had been calmed down by the police except Stites, who was “[v]ery loud, boisterous, rude, vulgar, swearing obscenities not only at me [the officer], but at the other party, her ex-boyfriend who was with Officer Ruszkowski trying to yell to get his attention.”⁷⁵ Stites continued to yell at another group of people in the street.⁷⁶ The focus of this opinion was whether Stites “exercised her constitutionally protected right to comment on a matter of public concern.”⁷⁷ The court determined that the mere presence of a police officer does not convert a defendant’s speech into political expression and that these facts established sufficient evidence that Stites made unreasonable noise.⁷⁸

In *Whittington v. State*,⁷⁹ the court reversed a disorderly conduct conviction where a police officer responded to a report of a domestic dispute at an Indianapolis apartment. Rhonda Whittington reported that her brother, the defendant, Eric Whittington, had struck her in the abdomen. As the police officer gathered information and summoned an ambulance, Eric continued to argue with James, Rhonda’s boyfriend. The defendant refused to calm down and in a loud and angry manner uttered “this is all bull----” and “f---

69. *Id.*

70. *Id.*

71. *Id.* at 1333.

72. *Id.*

73. *Id.* at 1334.

74. 627 N.E.2d 1343 (Ind. Ct. App. 1994).

75. *Id.* at 1344-45.

76. *Id.* at 1345.

77. *Id.* at 1334.

78. *Id.*

79. 634 N.E.2d 526 (Ind. Ct. App. 1994).

this s---.”⁸⁰ Judge Staton reaffirmed that the statutory prohibition against unreasonable noise is content-neutral and noted that the State must show first, that the speech infringed upon a right of peace and tranquility enjoyed by others, and second, that it was not merely epithets.⁸¹ He examined the forum of the defendant’s conduct and found “no evidence that Whittington’s speech was detectable by anyone outside his residence [nor] that it ‘intolerably impaired’ another person’s privacy or use of his land.”⁸² Judge Hoffman, however, dissented, asserting that sufficient evidence existed to distinguish these facts from those of *Price*. Here, the police were investigating a physical fight where a person was injured. The police had summoned an ambulance when the defendant and the victim’s boyfriend began arguing in the living room. The officer went there to calm and separate them but the defendant continued to yell epithets. The defendant’s conduct was causing everyone else to become upset again.⁸³ The dissent noted that: “James and Rhonda were subjected to Eric’s tirade under circumstances which did not allow them to escape. Further, the bombardment occurred within the privacy of the home. The officer gave Eric fair notice to refrain from unreasonable noise. After Eric refused, he subjected himself to criminal sanction.”⁸⁴

B. Status of Judicial Officers

Several decisions of the appellate courts have dealt with the issue of the authority of the judicial officer hearing criminal cases. Like civil courts, the criminal courts use master commissioners, referees, magistrates and judges pro tempore to handle expanding caseloads. It is generally acknowledged that only a judge, whether elected or appointed, a judge pro tempore, or a special judge, may enter an appealable final judgment.⁸⁵ If the court cannot determine from the record of proceedings how the judge or hearing officer was appointed, then the appellate court may dismiss the conviction.⁸⁶ The appellate courts are split on how to resolve these issues.⁸⁷

In *Boushehrey v. State*,⁸⁸ Judge Bartreau addressed the rationale for dismissal in a petition for rehearing. In *Boushehrey*, the trial judge had been appointed as a pro tempore in the Marion County Municipal Court. After the pro tem heard the evidence, he took the matter under advisement and attempted to enter a valid judgment nine days later. Neither side appealed the issue of the jurisdiction of the judge; however, the appellate court raised the issue *sua sponte* and determined that “[w]hile the judgment may be valid as between the parties when they fail to object, we retain the discretion to insist upon a validly entered judgment prior to review upon appeal.”⁸⁹ Thus, although the parties may waive review by failing to object at trial, this court dismissed the appeal *sua sponte*.

80. *Id.*

81. *Id.* at 527.

82. *Id.* (quoting *Price v. State*, 622 N.E.2d 954, 966 (1993)).

83. *Id.* at 528.

84. *Id.*

85. *Wells v. State*, 603 N.E.2d 903 (Ind. Ct. App. 1992).

86. *Cassidy v. State*, 626 N.E.2d 500 (Ind. Ct. App. 1993).

87. *Id.*

88. 626 N.E.2d 497 (Ind. Ct. App. 1993).

89. *Id.* at 499.

However, in *Billingsley v. State*,⁹⁰ a Second District panel said that the *Boushehrey* requirement "of a subsequent appointment is inconsistent with notions of judicial economy and, as a practical matter, may not be possible. If the regular judge has resumed the duties of the court, the judge pro tempore cannot be appointed as judge pro tempore."⁹¹ In writing for the majority, Judge Kirsch declined to follow the reasoning in *Boushehrey* and specifically held that the general authority of a judge pro tem continues, with special jurisdiction to:

1. Rule upon any motion or matter taken under advisement during the term of appointment;
2. Conclude and rule upon any trial or hearing commenced, but not concluded, during such term;
3. Hear and determine all motions relating to the evidence or conduct of a trial or hearing commenced during the term of appointment; and
4. Conduct the sentencing hearing and impose sentence in a matter tried during the term of appointment.⁹²

In October of 1994, the Second District decided *Woods v. State*.⁹³ Judge Friedlander noted sua sponte that the record reflected the valid appointment of the judge pro tempore for the date on which the trial occurred. However, the appointment term did not include the date on which the sentencing was conducted, and no subsequent appointment was made to include the date of the sentencing.⁹⁴ Judge Friedlander acknowledged the holdings of *Boushehrey* and *Billingsley*, and determined that the better line of reasoning was expressed in *Billingsley*. Therefore, he validated the pro tempore's appointment as judge for the purpose of entering judgment and presiding over the sentencing phase of the proceedings in the case.⁹⁵ Interestingly, Judge Sullivan's concurring opinion acknowledged his recent adherence to the holding of *Boushehrey*, but reconsidered his position in light of *Billingsley* and concurred with the affirmance in *Woods*. Conversely, Judge Bartreau adhered to the *Boushehrey* decision and voted to dismiss the appeal. Although "the approach taken in *Billingsley v. State* and by the majority here is more workable than the rule and makes sense," she felt obliged to "apply the rule as it is written and the rule says the authority of the judge pro tempore terminates at the expiration of the term."⁹⁶

The most recent case on this issue was decided by the Fifth District in *McMichel v. State*.⁹⁷ In this case, Judge Lopossa of the Marion Superior Court, Criminal Division, appointed Master Commissioner Alan Smith to serve as a pro tem judge in her court during her absence.⁹⁸ On May 28, 1992, Smith presided over McMichel's post-conviction

90. 638 N.E.2d 1340 (Ind. Ct. App. 1994).

91. *Id.* at 1343.

92. *Id.*

93. 640 N.E.2d 1089 (Ind. Ct. App. 1994).

94. *Id.* at 1090.

95. *Id.*

96. *Id.* at 1091-92 (citation omitted).

97. 641 N.E.2d 1047 (Ind. Ct. App. 1994).

98. *Id.* at 1048.

relief petition hearing. At the conclusion of the hearing Smith announced that he would review the exhibits, take the matter under advisement, and rule the following day.⁹⁹ On May 29, Smith entered an order of findings of fact and conclusions of law and denied the petition. The record did not contain the appointment of Smith as judge pro tem for any time period on May 29, 1992.¹⁰⁰ The record further showed that Judge Lopossa had returned and conducted court business on May 29, 1992.¹⁰¹ Writing for the majority, Judge Sharpnack found that because Judge Lopossa was available on May 29, Smith lacked the authority to enter a final appealable judgment in the case.¹⁰² Judge Sharpnack continued by asserting that “[t]he appropriate procedure in this case would have been for Judge Lopossa to appoint Smith judge pro tempore on May 29, 1992, to permit him to enter final judgment, or for her to enter final judgment upon review of his findings.”¹⁰³ Judge Sharpnack acknowledged the conflict between *Billingsley*, *Woods* and *Boushehrey*, and said “[t]his continuing conflict in the decisions of this court remains to be resolved by our supreme court.”¹⁰⁴

The Second District therefore would not require any additional documentation to establish the appointment of the judge pro tem at subsequent hearings. Nor does it appear that the Fourth District would make such a requirement, as its decision in *Dearman v. State*¹⁰⁵ allowed a properly appointed pro tem to conduct a sentencing hearing subsequent to the date of the appointment. In *Dearman*, Judge Brewer appointed Andrew Fogle as judge pro tem of the Marion Superior Court for several days in January of 1992. Dearman's jury trial began on January 30, while Fogle was acting as the duly appointed judge pro tem. Dearman was convicted, but his sentencing occurred after Fogle's term as judge pro tem expired. The court cited a previous appellate court decision in which transfer to the Supreme Court was denied on the grounds that once the judge pro tem has begun consideration of the case, he or she has jurisdiction to hear the case to completion.¹⁰⁶

Attorneys preparing the records of proceedings for criminal appeals ought to follow the recommendations of *Boushehrey v. State*¹⁰⁷ and *Dearman*,¹⁰⁸ and make certain that the record contains a clear indication of how the hearing officer was appointed. Failure to do so may well result in dismissal at the appellate level.

99. *Id.*

100. *Id.*

101. *Id.* at 1049.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Dearman v. State*, 632 N.E.2d 1156 (Ind. Ct. App. 1994).

106. *Harris v. State*, 616 N.E.2d 25, 33 (Ind. Ct. App. 1993), *trans. denied*, Aug. 3, 1993.

107. 626 N.E.2d 497 (Ind. Ct. App. 1993).

108. 632 N.E.2d 1156.

C. Search and Seizure

The Indiana Supreme Court established new ground on a major search and seizure issue when it rendered its decision to resolve the conflicting court of appeals cases of *Moran v. State*¹⁰⁹ and *Bell v. State*.¹¹⁰

In *Moran*, Judge Sharpnack addressed the interlocutory appeal of Dominic Moran and Andrew Holland, who challenged the denial of a motion to suppress evidence seized from garbage bags outside their home. The evidence was used to obtain a search warrant for their shared residence.¹¹¹

From May 1991 to April 1992, Indiana State Police operated a sting operation under the name of Circle City Hydroponics, a retail supplier of hydroponics supplies in Zionsville, Indiana. Its purpose was to identify people who grew marijuana in their homes. Between August 1991 and February 1992, Holland made several visits to Circle City Hydroponics to purchase supplies. Holland also had several conversations with undercover agents about growing facilities in his home.¹¹² Further police investigation revealed that, beginning in August 1991, the usage of electricity in Holland's home doubled that of the previous occupant of the house.¹¹³ On January 8, 1992, state police used a thermal imaging device on Holland's home to measure the differences in temperature of an object or structure. It found "several warm areas . . . which were unique when compared to other residences in the immediate neighborhood."¹¹⁴ On January 22, 1992, two state police officers removed materials from several plastic garbage containers that had been set out for the garbage collector at the end of the driveway in front of Holland's residence.¹¹⁵ The garbage containers were sealed with lids and were placed about one foot from the edge of the street. The contents, which included several opaque plastic garbage bags and loose items, were dumped into a pick-up truck and taken to the state police office. Upon examination, they found a green, leafy substance later proved to be marijuana plant clippings.¹¹⁶ On April 20, 1992, a search warrant, supported by the affidavit of Officer McClure, was issued. The affidavit was seventeen double-spaced pages detailing the sting operation, the process of hydroponic marijuana cultivation, and police surveillance of Holland.¹¹⁷ The warrant was executed on April 22, and the officers seized several marijuana plants and three bags of leafy material believed to be marijuana from the home.¹¹⁸

A motion to suppress evidence filed by Holland was denied by the trial court. Holland sought an interlocutory appeal, claiming that the defendants had a reasonable expectation of privacy in garbage put out for disposal, and therefore, that police needed

109. 625 N.E.2d 1231 (Ind. Ct. App. 1993), *aff'd*, 644 N.E.2d 536 (Ind. 1994).

110. 626 N.E.2d 570 (Ind. Ct. App. 1993).

111. 625 N.E.2d at 1233.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 1233, 1243.

118. *Id.* at 1234.

a warrant to seize the garbage, because no exception to the warrant requirement of the federal and state Constitutions existed. The motion also claimed that the search warrant lacked probable cause and was unlawful.¹¹⁹

The court first addressed the issue of whether the warrantless search of the garbage violated the United States Constitution. The court analyzed the United States Supreme Court's decision in *California v. Greenwood*,¹²⁰ where items found in trash bags picked up by the regular trash collector were used to support a warrant to search Greenwood's home. The *Greenwood* decision was based in part on the holding of an earlier case, *Katz v. United States*,¹²¹ which formulated the "reasonable expectation of privacy" test. That test, first adopted in Indiana in *Blalock v. State*,¹²² provides a two-part analysis. First, the individual must have an actual expectation of privacy. Second, society must recognize that expectation as reasonable.¹²³ The Court in *Greenwood* determined that an expectation of privacy in trash was unreasonable because plastic garbage bags left at the curb are accessible to "animals, children, scavengers, snoops and other members of the public."¹²⁴ Further, the Court held that garbage is placed at the curb "for the express purpose of conveying it to a third party, the trash collector, who might himself [sort] through [the] trash or permit others, such as the police, to do so."¹²⁵ *Greenwood* also held that police "cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."¹²⁶

In *Moran*, Judge Sharpnack reasoned that no Fourth Amendment distinction exists between taking the garbage directly from the property or taking it after it had been picked up by the garbage collector. Thus, the court found that the warrant was in fact a police search and seizure of Moran and Holland's trash and did not violate the Fourth Amendment of the United States Constitution.¹²⁷

The court then proceeded to examine the warrantless search in view of Indiana's Constitution. After noting that the language of the Indiana Constitution is virtually identical to its federal counterpart,¹²⁸ the court reiterated long standing constitutional principles when it acknowledged that "[t]he principle of the supremacy of federal law over state law prohibits Indiana courts from placing limitations on individual rights found to exist under the Federal Constitution by the United States Supreme Court; we may, however, impose higher standards on searches and seizures than required by Federal Constitution if we choose to do so."¹²⁹ The court discussed at length Indiana's protection of individual liberty prior to recognition by the United States Constitution, including: Indiana's prohibition against slavery; the provision of an attorney at public expense to

119. *Id.* at 1233-34.

120. 486 U.S. 35 (1988).

121. 389 U.S. 347 (1967).

122. 483 N.E.2d 439, 441 (Ind. 1985).

123. *Id.* at 441-42. See also *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

124. *Greenwood*, 486 U.S. at 39.

125. *Id.*

126. *Id.* at 35.

127. *Moran v. State*, 625 N.E.2d 1231, 1235-36 (Ind. Ct. App. 1993), *aff'd*, 644 N.E.2d 536 (Ind. 1994).

128. *Id.* at 1236.

129. *Id.*

indigent defendants; the admission of women to the practice of law in Indiana; and the acknowledgement of the right of the defendant to a “face-to-face” confrontation with witnesses.¹³⁰ The Court further noted that the Indiana Supreme Court adopted the exclusionary rule for violations of search and seizure requirements nearly forty years before federal law did the same.¹³¹

In reviewing the Indiana cases, the court concluded that “[a]n expectation of privacy, therefore, has been considered reasonable under Indiana law when attached to a place of residence, whether temporary, permanent, rented, or owned, or to the contents of a closed, opaque container when the container is the subject of a possessory interest.”¹³² The court then rhetorically asked whether the abandonment of property necessarily meant that the individual abandoned his expectation of privacy in it. The court framed the issue as “not whether a bag of trash may have a reasonable expectation of privacy, but whether persons may expect reasonably that their privacy interests in the concealed contents of their trash bags will be respected.”¹³³

In the absence of existing precedent in Indiana, the court looked to “general social norms” to conclude that “[g]arbage is, by its very nature, the leavings of the wide range of human activity, and there are many secrets that garbage may disclose.”¹³⁴ The court further concluded that, by placing trash into an opaque plastic bag, putting that bag into a can, putting a lid on the can, and then placing the can at the edge of the property with the sole purpose of having the trash collector take it and “mingle it with the trash of thousands of other citizens is to manifest an expectation that it will remain secure and private, at a minimum, until removed by the trash collector.”¹³⁵ Recognizing that there is a reasonable expectation of privacy in garbage and finding no exception to the warrant requirement, the court concluded that the trial court erred in finding no reasonable expectation of privacy in trash; therefore, it held that the warrantless search of the trash violated the protection against unreasonable search and seizure afforded by Indiana’s Constitution.¹³⁶

The court then addressed the search of the residence, which was based on the warrant. The trial court had denied the motion to suppress in part because of the “good faith” exception, which allows the admission of evidence seized in good faith reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be defective.¹³⁷ In countering the defendant’s argument that the affidavit was so “bare bones that no reasonably well trained police officer could have relied on its validity,”¹³⁸ the court cited the affidavit’s detail of: the sting operation; the process of hydroponics marijuana plant cultivation; the police surveillance of Holland; the conversations between Holland and police; the purchase of products by Holland commonly used in marijuana cultivation;

130. *Id.* at 1237.

131. *Id.*

132. *Id.* at 1238.

133. *Id.* at 1238-39.

134. *Id.*

135. *Id.* at 1239.

136. *Id.* at 1240.

137. *Id.* at 1240; *see also* IND. CODE § 35-37-4-5 (1994).

138. *Moran*, 625 N.E.2d at 1242.

the imaging of Holland's residence; and the police search of Holland's trash.¹³⁹ The court concluded that, based upon these facts, the magistrate had sufficient probable cause to issue a search warrant and therefore, the police officers could have relied upon its validity in good faith.

In *Bell v. State*,¹⁴⁰ a police officer drove by Bell's house and noticed that Bell had set out several opaque garbage bags near an alley outside of his home. The bags could be reached without stepping onto Bell's property, and appeared to be available for the garbage collector. The police officer seized the bags, acting on several tips he had received that Bell was dealing in marijuana. When the police searched the garbage, they discovered drug paraphernalia, a small amount of marijuana, and mail addressed to Bell. A search warrant was obtained, and Bell's home, automobile, and business were searched.¹⁴¹ Writing for the majority, Judge Robertson agreed with the rationale of *Greenwood* and upheld the validity of the search.¹⁴² In a footnote, he wrote, “[w]e accept as absolute truth the *Moran* court's observation that Hoosiers are distinguished by their civilized behavior. . . . Nevertheless, we believe that, unfortunately, not all uncivilized behavior has yet been eradicated from our state; and that, even in Indiana, it is common knowledge that garbage left out for collection is readily accessible to animals, children, scavengers, snoops, and other members of the public. Thus, we respectfully disagree that Hoosiers have a personal and legitimate expectation of privacy in the garbage they leave out for collection.”¹⁴³ Judge Najam filed a dissent, agreeing with the holding in *Moran*.¹⁴⁴

Indiana's Supreme Court decision in *Moran* upheld the police officer's seizure of the trash, holding that it was reasonable and did not taint the evidentiary basis for the search warrant.¹⁴⁵ Justice DeBruler wrote that “[w]e do not lightly entertain intrusions on those things that we regard as private, *i.e.* concealed and hidden. However, at the same time, the inhabitants of this state have always valued neighborliness, hospitality, and concern for others . . .”¹⁴⁶ DeBruler noted that police conducted themselves in “the same manner as would be appropriate for those whose duty it was” to collect the trash—without disturbances or commotion.¹⁴⁷ The search warrant for the house also was upheld under the state standard of reasonableness.¹⁴⁸

Indiana's Supreme Court dealt with the issue of consent to search in *Perry v. State*.¹⁴⁹ In *Perry*, the defendant claimed that the trial judge committed reversible error by admitting evidence that was obtained from an illegal search and seizure. Faceson, his girlfriend, signed a consent to search form.¹⁵⁰ The defendant argued that Faceson did not

139. *Id.* at 1243.

140. 626 N.E.2d 570 (Ind. Ct. App. 1993).

141. *Id.*

142. *Id.* at 572.

143. *Id.* at 572 n.2.

144. *Id.* at 573.

145. *Moran v. State*, 644 N.E.2d at 541 (Ind. 1994).

146. *Id.*

147. *Id.*

148. *Id.*

149. 638 N.E.2d 1236 (Ind. 1994).

150. *Id.* at 1240.

have authority to consent to the police request to search the house without a warrant and, therefore, the evidence seized by the police should have been inadmissible.¹⁵¹ The evidence showed that Faceson lived with the defendant "on and off" and Faceson told police after she was arrested for drug dealing that she and the defendant lived at the house. The search yielded narcotics and the defendant was charged. The court reviewed the authority for allowing a third party consent to search property, and found that consent arises from the mutual use of the property by "persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."¹⁵² The consent was deemed valid on the basis that it was reasonable for police to believe that Faceson was a resident of the house to be searched.¹⁵³

Motor vehicle searches have also been the subject of recent cases. In these situations, police routinely impound a vehicle and conduct an inventory search after an individual in that vehicle is stopped and subsequently arrested. Frequently, the issue becomes whether the impoundment and the subsequent inventory search are a mere subterfuge in order to conduct the search.

The Indiana Supreme Court granted transfer to examine the rules applicable to inventory searches of automobiles under the Fourth Amendment and reversed a conviction in violation of those rules in *Fair v. State*.¹⁵⁴ In October 1991, an Indianapolis police officer was dispatched to an apartment complex in response to a complaint that gun shots had been fired. The police dispatcher described the potential suspect. Upon arriving at the complex, the officer saw an individual who fit the description of the suspect placing a cylindrical object into the trunk of a car.¹⁵⁵ The officer lost sight of the suspect as he pulled into the parking lot, but re-established contact after the defendant closed the trunk and stood next to his car. The officer asked him to step away from the car and then performed a pat down search that turned up six twenty-gauge shotgun shells.¹⁵⁶ Convinced that Fair was intoxicated, the officer placed him under arrest, handcuffed him, and placed him in the back seat of the police car. The officer then entered the suspect's vehicle and searched the glove compartment for the stated purpose of locating rental papers to confirm Fair's claim that the car was leased.¹⁵⁷ After finding the rental papers, the officer decided to do an inventory search during which he found a green leafy substance that he believed to be marijuana. He then obtained keys from the defendant and looked in the trunk.¹⁵⁸ The officer found a shotgun on top of clothing in the trunk, and charged Fair with possession of marijuana, dealing in sawed-off shotguns, and public intoxication.¹⁵⁹

151. *Id.*

152. *Id.* at 1241 (citing *Stallings v. State*, 508 N.E.2d 550, 552 (Ind. 1987)).

153. *Id.*

154. *Fair v. State*, 627 N.E.2d 427 (Ind. 1993).

155. *Id.* at 429.

156. *Id.*

157. *Id.*

158. *Id.* at 430.

159. *Id.*

The Indiana Supreme Court reviewed the Fourth Amendment and its exceptions.¹⁶⁰ The “inventory exception” was defined by the United States Supreme Court in *South Dakota v. Opperman*, which allowed police to conduct a warrantless search of properly impounded automobiles if the search is designed to produce an inventory of the vehicle’s contents.¹⁶¹ The Indiana Supreme Court followed this decision¹⁶² and restated *Fair* by concluding that inventory searches involve an administrative or caretaking function rather than a criminal investigative function. Therefore, the Fourth Amendment’s warrant requirement is not material.¹⁶³ The court concluded that the reasonableness of the inventory search required an examination of the propriety of the impoundment, since the need for the inventory arises from that impoundment, as well as whether the scope of the inventory search is reasonable.¹⁶⁴

In determining whether the decision to impound was reasonable, the court addressed the defendant’s contention that the seizure of the car could only take place if a specific violation of a motor vehicle or forfeiture statute had occurred. The court rejected the argument, holding that impoundment was occasionally warranted by situations that were not set out in state statutes.¹⁶⁵ The court determined that police may discharge their caretaking function whenever circumstances compel them to do so, and that as long as the community caretaking function is invoked, impoundment is proper.¹⁶⁶ The court concluded that to justify impoundment, the prosecution must first demonstrate that “the belief that the vehicle posed some threat or harm to the community or was itself imperiled was consistent with objective standards of sound policing.”¹⁶⁷ Next, the State must show “that the decision to combat that threat by impoundment was in keeping with established departmental routine or regulation.”¹⁶⁸

The court further considered whether the officer could have found that the needs of the community were “implicated” where the arrest of the driver left the car unattended.¹⁶⁹ The court found that an undamaged vehicle had been neatly parked in a secure, private parking facility. The owners of the property had not complained and the officer’s action would not have left the car in the possession of an unqualified driver.¹⁷⁰ The court concluded that the claim by the officer that the vehicle required police attention because “it might be damaged” was speculative and was insufficient to serve as the sole justification for impoundment.¹⁷¹ “In short, there [was] nothing in the record to indicate that [the] vehicle constituted a potential hazard” that needed police attention.¹⁷²

160. *Id.*

161. *South Dakota v. Opperman*, 428 U.S. 364, 373 (1976).

162. *Dixon v. State*, 437 N.E.2d 1318, 1323 (Ind. 1982).

163. *Fair*, 627 N.E.2d at 430 (citing *South Dakota*, 428 U.S. at 370 n.5).

164. *Id.* at 431.

165. *Id.*

166. *Id.* at 432.

167. *Id.* at 433.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 435.

The court next examined the second stage of the requirement: whether the scope of the inventory was reasonable. The court determined that rules standardizing criteria or establishing routine must exist as a precondition to a valid inventory search to ensure that the inventory is not a pretext "for a general rummaging in order to discover incriminating evidence."¹⁷³ The procedures must be rationally designed to meet the objectives that justify the search and must limit the discretion of the officer in the field.¹⁷⁴ Thus, to defeat a charge of pretext, the State must establish the existence of well-defined regulations and show that the search was conducted in conformity with them.¹⁷⁵ Here, the search was conducted at the scene of the crime rather than in the impoundment lot. Furthermore, the inventory was conducted by the officer involved in the criminal investigation and not by the officer in charge of the impounded property, and there was no evidence of the completion of formal inventory sheets. Finally, the officer did not take note of the defendant's personal effects, and no evidence in the record indicated that the car was actually impounded. The court held that these facts collectively established that the inventory search was nothing more than a pretext to conduct a full search and, thus, was improper.¹⁷⁶ Justice Givan dissented, noting that inventory search was justified for several reasons: the officer had reason to believe the defendant was the person who had fired the shots; the officer had a duty to protect the owner's property; the officer saw the defendant place an object in the trunk of the car; and the officer discovered shotgun shells on the defendant.¹⁷⁷

In *Moore v. State*,¹⁷⁸ a police officer stopped a car in which Moore was a passenger after he observed erratic driving and excessive speed. The deputy placed the driver under arrest for driving while intoxicated, and other deputies observed that Moore also showed signs of intoxication. After determining that Moore was too impaired to drive, the police called for a tow truck and conducted an inventory search of the vehicle. In a paper bag in the glove compartment, police found cocaine packaged for sale. Moore was charged and convicted of dealing in cocaine in an amount greater than three grams.¹⁷⁹ On appeal, Moore claimed that the warrantless search of the glove compartment was not a proper inventory search and thus violated his Fourth Amendment rights.¹⁸⁰

After reviewing the standards set out by the Indiana Supreme Court in *Fair*, the appellate court determined that because the car would have been left unattended on the highway after the driver's arrest, the decision to impound was lawful.¹⁸¹ The court further held that the Tippecanoe County Sheriff Department had standard operating procedures regarding inventory searches and that those procedures were followed.¹⁸² The court stated that "[t]he potential risks and essential issue in this case [are] whether the inventory

173. *Florida v. Wells*, 495 U.S. 1, 4 (1990).

174. *Fair*, 627 N.E.2d at 435.

175. *Id.*

176. *Id.* at 436.

177. *Id.* at 437.

178. *Moore v. State*, 637 N.E.2d 816 (Ind. Ct. App. 1994), *cert. denied*, 115 S. Ct. 1132 (1995).

179. *Id.* at 818.

180. *Id.*

181. *Id.* at 819.

182. *Id.* at 820.

search was actually conducted in a routine manner pursuant to department standard operating procedures or rather, whether it was used as a pretext to camouflage a complete investigatory search. If the facts of this case fall into the latter type of search, the search is unreasonable and will not be tolerated.”¹⁸³ Because the inventory search in this situation was completed pursuant to standard operating procedures, the court found that the contraband was seized properly.¹⁸⁴

In *State v. Smith*,¹⁸⁵ the court held that police can make investigatory stops based on information from concerned citizens received via police dispatch. In *Smith*, the trial court granted a motion to suppress based upon illegal search and seizure. The police officer did not personally observe Smith’s erratic driving, but relied upon a police dispatch report to provide a “reasonable suspicion” of criminal activity.¹⁸⁶ The dispatch was based on a 911 call on citizen band radio reporting that a car on the interstate had driven into the median and was weaving from lane to lane. As the officer caught up with Smith on the interstate, he did not observe erratic driving; however, he saw that a general description of the vehicle and its license plate number matched the dispatch. The officer pulled Smith over and smelled alcohol on his breath. Smith also failed a field sobriety test.¹⁸⁷ The court reversed the trial court’s ruling on the motion to suppress, holding that “[u]nder appropriate circumstances, the police may stop a vehicle to briefly investigate the possibility of criminal activity, without having probable cause to make an arrest.”¹⁸⁸ The court noted that police must have specific and articulable facts which, when considered together with the rational inferences from those facts, create a reasonable suspicion of criminal conduct on the part of the vehicle’s occupants. There must be a particularized and objective basis for suspecting the driver of criminal activity.¹⁸⁹ The court cited the Indiana Supreme Court decision in *Moody v. State*,¹⁹⁰ which held that when “police officers act in good faith reliance on a police dispatch report that a crime has been committed, there is no need to show that the source of the dispatcher’s information is reliable.”¹⁹¹ In this case, the police officer possessed sufficiently articulable facts to give him a reasonable suspicion that Smith’s vehicle was being operated by an impaired driver, thus sustaining the legality of the investigatory stop.¹⁹²

The Indiana Supreme Court reviewed circumstances that justify warrantless entry into a home in *Esquerdo v. State*.¹⁹³ In *Esquerdo*, the State attempted to justify a warrantless entry into Esquerdo’s home to prevent the destruction of evidence as an exigent circumstance exception to the warrant requirement. The officers testified that their suspicion that evidence was being destroyed in the residence rested on certain “beliefs”

183. *Id.* (citing *Paschall v. State*, 523 N.E.2d 1359 (Ind. 1988)).

184. *Moore*, 637 N.E.2d at 821.

185. 638 N.E.2d 1353 (Ind. Ct. App. 1994).

186. *Id.* at 1355.

187. *Id.* at 1354.

188. *Id.* at 1355 (citing *State v. Nesius*, 548 N.E.2d 1201, 1203 (Ind. Ct. App. 1990)).

189. *Id.*

190. 448 N.E.2d 660 (Ind. 1983).

191. *Smith*, 638 N.E.2d at 1355 (citing *Moody*, 448 N.E.2d 660, 663)).

192. *Id.* at 1356.

193. 640 N.E.2d 1023, 1026 (Ind. 1994).

that a confidential informant had given to the officers: that the defendant was "paranoid"; that the defendant "may have seen" the police officers outside the residence at the time of the controlled buy; and that the defendant "might be destroying or getting ready to leave with the evidence."¹⁹⁴ When police entered without a warrant, they had in their possession the cocaine purchased during a controlled buy, but they did not know that additional narcotics were present in the house.¹⁹⁵ The confidential informant did not specifically tell the police that evidence was being destroyed.¹⁹⁶ The house and its entrances were under constant surveillance, and the defendant could not escape.¹⁹⁷ Therefore there was no possibility that the marked money used to purchase the narcotics could be distributed before a warrant could be obtained.¹⁹⁸

The court held that the State was required to show, by clear and convincing evidence, that the police had an objective and reasonable fear that evidence was about to be destroyed.¹⁹⁹ Writing for the majority, Justice DeBruler explained that the rationale for the exception to the warrant requirement is the need for quick action, because evidence is actually in the process of being destroyed or is about to be destroyed.²⁰⁰ In this situation, the court found that the evidence presented at trial was not sufficient to support a finding that the police officers held an objective and reasonable fear of the loss of either the marked money or other possible evidence of drug dealing. The court held that the police should have obtained a search warrant before entering the residence.²⁰¹

Furthermore, in *Esquerdo*, police conducted a protective sweep of the residence and found some quantities of cocaine and marijuana in plain view.²⁰² After the protective sweep, the police wrote a probable cause affidavit that included the information gained from the improper warrantless search. Police then obtained a search warrant for the residence.²⁰³ The court reviewed state and federal constitutional law, including *Segura v. United States*,²⁰⁴ in which federal agents used improperly seized evidence as the basis for a search warrant. The court in *Segura* had to decide whether the challenged evidence was obtained by exploitation of the initial warrantless entry and search or by another method that was distinguishable from the illegal entry.²⁰⁵ The *Segura* court affirmed the use of this evidence, holding that a sufficient, independent source of probable cause existed for the warrant.²⁰⁶ In *Esquerdo*, however, such independent source of probable cause was lacking. Rather, the judge who issued the warrant relied solely on the

194. *Id.* at 1027.

195. *Id.*

196. *Id.*

197. *Id.* at 1028.

198. *Id.*

199. *Id.* at 1027.

200. *Id.* at 1028. See also *Harless v. State*, 577 N.E.2d 245, 248 (Ind. Ct. App. 1991); *Ludlow v. State*, 314 N.E.2d 750, 752 (Ind. 1974).

201. *Esquerdo*, 640 N.E.2d at 1028.

202. *Id.*

203. *Id.* at 1029.

204. 468 U.S. 796 (1984).

205. *Id.* at 797.

206. *Id.* at 810.

improperly obtained information, as marijuana was not mentioned by the confidential informant, and its presence was known only after illegally entering the defendant's residence.²⁰⁷ As a result, the misconduct of the police led to the discovery of evidence that was crucial to the formation of probable cause for the issuance of the warrant, and therefore, the warrant was not sustained.²⁰⁸

D. Criminal Rule 4

Several recent decisions regarding Criminal Rule 4 dealt with the courts' congested calendars and the defendant's right to a speedy trial. While a court's congested calendar is the only acceptable justification for exceeding the speedy trial limits set by Rule 4,²⁰⁹ the Indiana courts are split over what constitutes a congested calendar.

In *Raber v. State*, the court remanded the case to the trial court because no factual basis for the court's congested calendar was documented in the court records.²¹⁰ Raber was arrested and charged with operating a motor vehicle while intoxicated and other driving violations on March 17, 1989. The case was moved to a superior court on March 23, 1989 and a trial date of June 26, 1989 was set.²¹¹ Thereafter, the State requested one continuance and Raber requested four. Two notices of congested calendar were also filed, which extended the trial date to May 8, 1991.²¹²

On February 7, 1991, the State moved to continue and a new trial date was set for July 1991. A congested calendar notice was again filed on that date, and the trial was reset for October 28, 1991.²¹³ However, that jury trial was vacated on October 23, when the court determined during a hearing that Raber did not have counsel and could not proceed without pauper counsel.²¹⁴ Raber's trial finally began March 9, 1992, and ended in a conviction on March 10. On June 3, 1992, the defense filed a motion for discharge, which was denied.²¹⁵

The court held that Raber acquiesced to the July 1 date, even though it exceeded the speedy trial limit, since he appeared on that date with counsel and was ready for trial. However, that fact did not preclude him from enforcing his right to a speedy trial without delay, as guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 12 of the Indiana Constitution, as implemented by Indiana Criminal Rule 4.²¹⁶ The court held that while Raber did not file a timely motion for discharge (immediately after his counsel withdrew), his oral motion at the October 23 hearing was sufficient to preserve his right to a speedy trial.²¹⁷ At that hearing, Raber said that he felt

207. *Esquerdo*, 640 N.E.2d at 1030.

208. *Id.*

209. *Crosby v. State*, 597 N.E.2d 984, 987 (Ind. Ct. App. 1992).

210. 622 N.E.2d 541, 547 (Ind. Ct. App. 1993), *appeal after remand*, *Raber v. State*, 626 N.E.2d 506 (Ind. Ct. App. 1993).

211. *Id.* at 544-45.

212. *Id.* at 545.

213. *Id.*

214. *Id.* at 546.

215. *Id.* at 545.

216. *Id.* at 544.

217. *Id.* at 546.

his rights were violated and that he wanted a speedy trial, which the court likened to an oral motion for discharge.²¹⁸ The court wrote, “[w]e must be attentive when a defendant, proceeding pro se, asserts this right and clearly presents the question of discharge for the trial court’s determination.”²¹⁹

After remanding the case to determine whether a factual basis existed for the court’s congested calendar, the court affirmed Raber’s conviction, holding that the trial court’s findings were reasonable and did not amount to an abuse of discretion.²²⁰ The trial court’s record reflected that another jury trial had started and would not end by the day Raber’s trial was set, thereby forcing the court to congest its calendar.²²¹

However, two recent decisions reject *Raber*’s requirement of documented findings of fact to establish a court’s congested calendar. In *Bridwell v. State*,²²² the defendant based his appeal on a 209-day delay, which resulted from the court’s congested calendar. The delay prevented him from being brought to trial within one year, as mandated by Rule 4(C). The court, in affirming Bridwell’s conviction, wrote that “[t]here is a point where delay (due to a congested calendar), regardless of the justification, violates the right to a speedy trial.”²²³ It further stated that “[b]ecause the delay was not excessive in this case, that point was not reached.”²²⁴ However, Judge Sullivan furnished a strong dissenting opinion echoing *Raber*’s charge to the court: “It is not the obligation of the defendant to monitor and schedule the court’s trial calendar. It is the court’s function to protect the right to a speedy trial.”²²⁵

In *Clark v. State*, the defendant orally requested a speedy trial during his initial hearing and later filed a written motion.²²⁶ The court held that his oral motion was sufficient to preserve his right to a speedy trial, but the 133-day delay caused by the congested calendar was not excessive.²²⁷ Furthermore, the court held that a trial court’s calendar may be congested “for a variety of reasons”—not only the fact that another jury trial is in progress.²²⁸ In declining to follow *Raber*, the court wrote, “[a]bsent an allegation that the court congestion continuance was merely subterfuge, we accept the court’s affirmation of congestion. The exact nature of that congestion is immaterial.”²²⁹

Judge Najam delivered a strong dissent, noting that “[t]he finding of congestion should be sufficiently specific to assure meaningful appellate review and to assure that use of the congestion exception does not eviscerate the Rule itself.”²³⁰

218. *Id.* at 546-47.

219. *Id.* at 547.

220. *Raber v. State*, 626 N.E.2d 506, 508 (Ind. Ct. App. 1993).

221. *Id.*

222. 640 N.E.2d 437 (Ind. Ct. App. 1994).

223. *Id.* at 439.

224. *Id.*

225. *Id.* at 440.

226. 641 N.E.2d 75, 76 (Ind. Ct. App. 1994).

227. *Id.* at 77.

228. *Id.*

229. *Id.* (quoting *Bridwell v. State*, 640 N.E.2d 437, 439 (Ind. Ct. App. 1994)).

230. *Id.* (quoting *Raber v. State*, 622 N.E.2d 541, 547 (Ind. Ct. App. 1993)).

Indiana's Supreme Court used a balancing test to determine whether a defendant's right to a speedy trial had been violated in *Roseborough v. State*.²³¹ In *Roseborough*, the court affirmed the defendant's murder conviction after examining the facts of the case and the reasons for delay. Roseborough was charged on January 17, 1992, but was not brought to trial until February 1, 1993.²³² During that time, Roseborough's first defense attorney was suspended from the practice of law.²³³ The court found that because of the extensive pretrial investigation and preparation required in the case, the second attorney needed more time to prepare an adequate defense.²³⁴ Therefore, the court balanced the defendant's right to a speedy trial with his right to effective representation, and determined that neither was violated in setting the trial beyond the one-year limitation.²³⁵

The court held in *Nance v. State* that the burden of ensuring that a defendant is tried within one year rests with the State.²³⁶ In reversing Nance's convictions for drug and other charges, the court held that the defendant's only duty is to object if a trial date is set beyond the one-year period.²³⁷

At issue in *Nance* were two delays at pretrials, where the court set other pretrial dates, but did not set other jury trial dates.²³⁸ No reason was given for either delay. The court held that when the record is silent, delay is not attributable to the defendant.²³⁹ A defendant who is incarcerated must be brought to trial within seventy days under Rule 4(B).²⁴⁰ However, the court in *Hornaday v. State* held that "when identical charges are refiled they are regarded as if no dismissal occurred or as if the subsequent charges were filed on the date of the first charges."²⁴¹ The clock stops during the period between dismissal and refiling, but then begins running where it left off.²⁴² However, the court denied Hornaday post-conviction relief on his robbery conviction because he did not object when the court set the trial date beyond the seventy-day period, thus abandoning his prior request for an early trial.²⁴³ The court also noted that the circuits are in conflict on this issue.²⁴⁴

Indiana's highest court also considered the Rule 4(D) extension in *Ewing v. State*.²⁴⁵ In *Ewing*, the defendants appealed their convictions for dealing in marijuana and other drug-related charges because they were not brought to trial within one year. The State pursued a continuance on Rule 4(D) grounds, which allows a ninety-day extension when

231. 625 N.E.2d 1223, 1225 (Ind. 1993).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. 630 N.E.2d 218, 220 (Ind. Ct. App. 1994).

237. *Id.* (citing *Butts v. State*, 545 N.E.2d 1120, 1124 (Ind. Ct. App. 1989)).

238. *Id.* at 221.

239. *Id.*

240. *Williams v. State*, 631 N.E.2d 485, 486 (Ind. 1994).

241. 639 N.E.2d 303, 307 (1994) (quoting *Young v. State*, 521 N.E.2d 671, 673 (Ind. 1988)).

242. *Id.* at 308.

243. *Id.* at 309.

244. *Id.* at 306.

245. 629 N.E.2d 1238, 1239 (Ind. 1994).

the court is satisfied that the State's evidence is temporarily unavailable but can be produced in ninety days.²⁴⁶ The State also must show that reasonable efforts to procure the missing evidence have been made, and that just cause exists to believe it can be produced in ninety days.²⁴⁷ The court reversed the convictions and remanded the case with instructions to grant the defendants' motion for discharge because the record did not indicate that the requirements of the rule were satisfied.²⁴⁸ The court noted that the trial court failed to issue findings of fact and law when it denied the defendants' motion for discharge.²⁴⁹ Furthermore, the court held that the record gave no evidence that the State had met the criteria of the rule, thereby warranting reversal.²⁵⁰

E. Jury Deliberations

Indiana's Supreme Court handed down several interesting decisions in the past year relating to jury deliberations. In *Farrell v. State*, the court found that allowing jurors to deliberate for nearly thirty hours without rest warranted a new trial for the defendant.²⁵¹ Farrell's kidnapping trial lasted three days, and the jurors began deliberations about 8:15 p.m. on the evening of the third day.²⁵² Sometime in the early morning hours of the fourth day, the jury returned to court with four questions. At that time, the foreman indicated that they could possibly reach unanimous verdicts on each of the six counts with additional time.²⁵³ Instructions were re-read to the jury, exhibits were reviewed, and the trial court judge ordered breakfast for the panel—with no objection from the defense.²⁵⁴

Around noon on the fourth day, the jury again returned to open court and indicated that they had reached verdicts on some of the counts, but not all six. The foreman again told the court that more time might enable the jury to agree on the remaining counts.²⁵⁵ Defense counsel objected at this time, because the jury had been deliberating for sixteen hours without rest. However, the trial judge and attorneys agreed to provide the jury lunch, give them a few more hours together, and then sequester them so they could rest. The jury returned guilty verdicts on all six counts within the next two or three hours.²⁵⁶

In ordering a new trial, the court deemed this the first case in Indiana law in which the trial court abused its discretion by retaining a jury in deliberations for an excessive period of time without a break.²⁵⁷ Although the length of jury deliberations is within the sound discretion of the trial judge,²⁵⁸ this power is coupled with a duty to conduct trial proceedings "in a manner that facilitates ascertainment of truth, insures fairness, and

246. *Id.*

247. *Id.*

248. *Id.* at 1240.

249. *Id.* at 1239.

250. *Id.* at 1240.

251. 622 N.E.2d 488, 493 (Ind. 1993).

252. *Id.* at 490.

253. *Id.*

254. *Id.*

255. *Id.* at 490-91.

256. *Id.* at 492.

257. *Id.* at 493.

258. *Id.* at 492 (citing *King v. State*, 531 N.E.2d 1154, 1161 (Ind. 1988)).

obtains economy of time and effort commensurate with the rights of both society and the criminal defendant.”²⁵⁹ In its opinion, the court noted the findings of several studies on sleep deprivation and its detrimental effects, and concluded that “[a]fter twenty-four hours without sleep, we question the ability of many people to remain rational and clear-thinking.”²⁶⁰

However, in *Pruitt v. State*, the Indiana Supreme Court affirmed a murder conviction resulting from a jury trial in which the jurors were permitted to separate during deliberations.²⁶¹ The jury began deliberating on May 21, 1992, at 3 p.m., and about two hours later, the judge admonished them and sent them home for the evening.²⁶² On the following day, the jury deliberated for about one and one-half hours before rendering a guilty verdict.²⁶³ On appeal, the defendant asserted that allowing the jury to separate constituted reversible error.²⁶⁴

The court reiterated the general rule that a jury should remain together until a verdict is reached.²⁶⁵ However, if a jury is allowed to separate, the State must prove beyond a reasonable doubt that the deliberations of the jurors were not affected by the separation and that the verdict was clearly supported by the evidence.²⁶⁶

In this case, the trial court judge clearly announced his intention to let the jury go home for the evening, and defense counsel raised no objection. Therefore, the court held that the issue cannot be raised for the first time on appeal.²⁶⁷ Additionally, during a post-trial hearing, all twelve jurors said they were not affected by the separation; thus, the court found that the State had sustained its burden.²⁶⁸

Once a jury begins deliberating, communication between the jury and the court is limited to questions directed to the court through the bailiff in charge of the jury. Questions are examined in open court, with the prosecutor, defense attorney and defendant present. Failure to follow these procedures constituted reversible error in *Jewell v. State*.²⁶⁹ In *Jewell*, the bailiff had several contacts with the jury during deliberations, including bringing them certain requested instructions. Further, the bailiff asked if the jury needed overnight accommodations; and when asked by the foreman how much lodging would cost, the bailiff conferred with the judge before telling the foreman it would cost about \$750.²⁷⁰ The foreman responded that they would continue deliberations, and the jury later returned with verdicts.

259. *Id.* (citing *Proctor v. State*, 584 N.E.2d 1089, 1091 (Ind. 1992)).

260. *Id.* at 493.

261. 622 N.E.2d 469, 476 (Ind. 1993).

262. *Id.* at 471.

263. *Id.*

264. *Id.*

265. *Id.* (citing *Walker v. State*, 410 N.E.2d 1190, 1192 (Ind. 1980)).

266. *Id.*

267. *Id.* at 472.

268. *Id.*

269. 624 N.E.2d 38, 44-45 (Ind. Ct. App. 1993).

270. *Id.* at 40-41.

The court held that the accumulated ex parte communication between the judge and the jury warranted reversal, even if each incident taken individually was harmless.²⁷¹ Furthermore, in order to protect the defendant's constitutional right to be present at all critical stages of his criminal prosecution, the written jury instructions should not have been sent to the jury room after deliberations began unless the action was discussed and the ruling made in open court.²⁷²

Failure to follow the established open-court procedure for deliberations resulted in a reprimand, but no reversal in *Grant v. State*.²⁷³ In *Grant*, the trial court received a question from the jury and indicated, without discussing the question in open court, that it could not answer. Because the court did not preserve the note, the exact wording of the question was not known. The charge in the case was conspiracy to commit dealing in cocaine, and the trial judge said the question dealt with the entrapment defense and the role of special agents.²⁷⁴

The court rebuked the trial court for not preserving the record and for failing to respond to the question in open court, but held the error harmless.²⁷⁵ The court determined that when a trial judge merely responds to a jury question by denying the request, any inference of prejudice is rebutted and any error is deemed harmless.²⁷⁶

F. Criminal Gang Activity

As a response to the crisis caused by violent street gangs whose members threaten and terrorize citizens and neighborhoods, Indiana's General Assembly enacted a statute prohibiting criminal gang activity in 1991. In the past year, the statute was scrutinized in two cases and passed constitutional muster.

The statute prohibits criminal gang activity and criminal gang intimidation. A person who "knowingly or intentionally actively participates in a criminal gang commits criminal gang activity, a class D felony."²⁷⁷ Criminal gang intimidation, a class C felony, occurs when a person threatens another person for refusing to join a criminal gang or withdrawing from a criminal gang.²⁷⁸ A criminal gang is defined as a group with at least five members that "specifically (1) either: (A) promotes, sponsors or assists in; or (B) participates in; or (2) requires as a condition of membership or continued membership; the commission of a felony or an act that would be a felony if committed by an adult, or the offense of battery."²⁷⁹

In *Helton v. State*, the court analyzed the statute and determined that it was not void for vagueness, overbroad nor violative of the equal protection guaranteed under the Due

271. *Id.* at 43.

272. *Id.* (citing *Cornett v. State*, 436 N.E.2d 765, 766 (Ind. 1982)).

273. 623 N.E.2d 1090, 1097-98 (Ind. Ct. App. 1993), *trans. denied*, March 18, 1994.

274. *Id.* at 1097.

275. *Id.*

276. *Id.* (citing *Thompson v. State*, 555 N.E.2d 1301, 1304 (Ind. Ct. App. 1990), *trans. denied*, Oct. 30, 1990).

277. IND. CODE § 35-45-9-3 (Supp. 1994).

278. *Id.* § 35-45-9-4.

279. *Id.* § 35-45-9-1.

Process Clause.²⁸⁰ Additionally, the court found that the statute did not give the prosecutor unfettered discretion to enforce it arbitrarily and discriminatorily.²⁸¹

Helton was a member of the Imperial Gangster Disciples (IGD).²⁸² In February, 1992, twelve to fourteen members of the gang met to initiate a new member, Travis Hammons. During the ritual, Helton delivered twenty bare-fisted blows to Hammons's head.²⁸³ Hammons knew of the initiation procedure and had consented to the blows in order to become an IGD member.²⁸⁴ Helton was convicted of criminal gang activity in a trial before the court and was given a three-year sentence, which was suspended as long as he complied with the terms of his probation.²⁸⁵

Helton first argued that the criminal gang statute was void for vagueness. The appellate court agreed that "under the basic principles of due process, a law is void for vagueness if its prohibitions are not clearly defined."²⁸⁶ The court noted that "a statute is not void for vagueness if individuals of ordinary intelligence would comprehend it to fairly inform them of the generally proscribed conduct."²⁸⁷ The court held that the "Gang Statute clearly forbids a person from knowingly and actively participating in a group with five or more members which participates in and requires as a condition of membership the commission of a battery. . . . Helton's conduct is clearly proscribed by the Gang Statute."²⁸⁸

Helton also argued that the statute was vague because it did not warn him of the consequences of striking a consenting victim. The court disagreed, stating that lack of consent is not a statutory element of the offense of battery in Indiana.²⁸⁹ Furthermore, the Indiana Supreme Court also has held that the victim's consent is not a defense to the charge of battery in certain circumstances.²⁹⁰

Helton next claimed that the statute was void for vagueness because its terms invited arbitrary and discriminatory enforcement. Again, the court emphasized that the statute does not prohibit mere association.

[U]ndesirable groups, the wrong type of crowd, or annoying conduct alone is not punishable under the Gang Statute. . . . Rather the group must be one which promotes, sponsors, assists in, or participates, and requires as a condition of membership the commission of a felony or battery and the person must actively

280. 624 N.E.2d 499 (Ind. Ct. App. 1993).

281. *Id.* at 507.

282. *Id.* at 504.

283. *Id.*

284. *Id.*

285. *Id.* at 505.

286. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

287. *Id.* at 505-06 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 607-08 (1973)).

288. *Id.* at 506.

289. See IND. CODE § 35-42-2-1(a) (1994), which defines battery as "when a person knowingly or intentionally touches another person in a rude, insolent, or angry manner."

290. *Helton*, 624 N.E.2d at 506 (citing *Jaske v. State*, 539 N.E.2d 14, 17-18 (Ind. 1989)).

participate in the group, with knowledge of the group's criminal conduct and a specific purpose to facilitate the group's criminal conduct²⁹¹

Helton next charged that the statute was overbroad and may therefore interfere with the exercise of First Amendment rights and other legally permissible conduct, such as contact sports. Indiana law has no overbreadth analysis²⁹² and because the gang statute is not incapable of constitutional application, the issue is whether its application in this case was constitutional.²⁹³ The court held the application of the statute constitutional, noting that Indiana's protections of free speech and free association do not protect associations made in furtherance of criminal activity.²⁹⁴

Under the federal law analysis, the court found that the statute was not overbroad. “[T]he Gang Statute does not impermissibly establish guilt by association alone, but it requires that a defendant's association pose the threat feared by the General Assembly in proscribing it, that is, the threat of criminal gang activity which terrorizes peaceful citizens.”²⁹⁵ Furthermore, the court reasoned that the commission of a felony or a battery is not protected activity even when committed by a group exercising their constitutional right to free association.²⁹⁶ “The Gang Statute does not cut deeper into the freedom of association than is necessary to deal with the substantive evil of gang violence,” the court wrote.²⁹⁷

Lastly, Helton argued that he was denied equal protection under due process because he was prosecuted for a class D felony under the criminal gang activity statute, but could have been prosecuted for a class B misdemeanor under Indiana's Hazing Statute.²⁹⁸

The court explained that the class B misdemeanor hazing applies to acts creating only a risk of bodily injury. If the hazing results in serious bodily injury, the perpetrator may be prosecuted for criminal recklessness, a class D felony.²⁹⁹ The court held that the statutes do not proscribe different punishment for the same conduct depending upon the actor; under each statute, the person commits a class D felony for the same type of act.³⁰⁰ The court went further to note that the fact that the prosecutor's power to decide to prosecute a crime extends to two crimes “does not convert this discretion into an unconstitutional delegation of legislative authority or constitute an equal protection violation.”³⁰¹

Helton was upheld later in *Jackson v. State*.³⁰² Jackson, a member of the “Gs” gang in Marion, was charged with criminal gang activity and conspiracy to commit burglary.

291. *Id.* at 507.

292. *Price v. State*, 622 N.E.2d 954, 957 (Ind. 1993).

293. *Helton*, 624 N.E.2d at 507.

294. *Id.* at 508.

295. *Id.* at 508-09.

296. *Id.* at 509.

297. *Id.* at 511.

298. *Id.* at 511-12; *see also* IND. CODE § 35-42-2-2 (1994).

299. *Helton*, 624 N.E.2d at 512.

300. *Id.*

301. *Id.*

302. 634 N.E.2d 532 (Ind. Ct. App. 1994).

A jury acquitted Jackson of the burglary charge but convicted him under the gang statute.³⁰³ Evidence at trial revealed that the “Gs” had at least nine members in Marion and anyone who wanted to be a member had to fight. Additionally, new members were “jumped” or beaten, and members who broke rules were “violated,” or made to stand in a corner and be beaten.³⁰⁴ Like Helton, Jackson argued that the beatings among group members were not batteries. But this court followed the *Helton* decision and held that the criminal gang statute covered intra-group fighting, specifically the beatings that were given to other members as part of initiation or punishment.³⁰⁵

Jackson further argued that he did not actively participate in the gang as required by the statute because no evidence indicated that he committed a battery or was involved in the burglary. The court reasoned that the State did not have to prove that Jackson himself administered the beating or committed the felony to prove that he actively participated in the gang.³⁰⁶ Active participation requires more than mere membership. However, in this case, the evidence showed that Jackson was leader of the “Gs” during the summer of 1990, when the burglary occurred, and he was known as the “Chief Violator.”³⁰⁷ Therefore, the court affirmed that the evidence was sufficient to show that Jackson was an active member of a criminal gang.

G. Misconduct Evidence

Case law continues to redefine and refine the use of misconduct evidence since Indiana adopted the Federal Rules of Evidence in *Lannan v. State*.³⁰⁸ Indiana and Federal Rules 404(b) and 403 set out the two-prong test for admission of misconduct evidence.³⁰⁹ The conduct first must be admitted under one of the listed exceptions to the general rule that such evidence is inadmissible.³¹⁰ Secondly, its probative value must substantially outweigh its prejudicial value.³¹¹

The *Lannan* case also abolished the depraved sexual instinct exception that allowed prosecutors to use evidence of the defendant’s prior sexual conduct at trial to show the defendant’s depraved sexual instinct.³¹² Since then, prosecutors have attempted to have such evidence admitted under one of the other exceptions. In *Martin v. State*,³¹³ the court affirmed convictions for criminal deviate conduct, attempted child molesting, and child molesting, in a crime involving neighbor children.³¹⁴ Here, the trial court allowed the

303. *Id.* at 533.

304. *Id.*

305. *Id.* at 534.

306. *Id.* at 534-35.

307. *Id.* at 535.

308. 600 N.E.2d 1334, 1335 (Ind. 1992).

309. FED. R. EVID. 403-04; IND. R. EVID. 403-04.

310. *Id.* (Under IND. R. EVID. 404(b) prior acts of a defendant may be admissible for purposes such as proof of motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident. FED. R. EVID. 404(b) is almost identical, but includes “opportunity” as an exception.).

311. FED. R. EVID. 403; IND. R. EVID. 403.

312. *Lannan*, 600 N.E.2d at 1341.

313. 622 N.E.2d 185 (Ind. 1993).

314. *Id.* at 188.

defendant's daughter to testify to prior acts of sexual misconduct.³¹⁵ The court held that it was error to admit such evidence because it did not fall into one of the exceptions.³¹⁶ However, the court found that the error was harmless because the totality of the evidence did not reveal a substantial likelihood that the improper evidence contributed to the conviction.³¹⁷

Conversely, the supreme court reversed a child molestation conviction based on improper admission of misconduct evidence in *Wickizer v. State*.³¹⁸ In *Wickizer*, the victim was a fourteen-year-old male, and the trial court admitted evidence of the defendant's prior sexual conduct with other male youths under the intent exception of Indiana Rule 404(b).³¹⁹ The court held that "Indiana is best served by a narrow construction of the intent exception in [Federal Rule of Evidence] 404(b)." ³²⁰ "To allow the introduction of prior conduct evidence [as proof of a general or specific intent element in a criminal offense] would be to permit the intent exception to routinely overcome the rule's otherwise emphatic prohibition against [such evidence] . . . and produce the 'forbidden inference.'" ³²¹

The intent exception is "available when a defendant goes beyond merely denying the charged culpability and affirmatively presents a claim of particular contrary intent."³²² In *Wickizer*, independent proof of the defendant's intent consisted only of testimony from the victim and the defendant. The court found that such error warranted reversal, because it was unable to conclude that the jury was not substantially swayed by the prior conduct testimony.³²³

Evidence of prior sexual misconduct was properly admitted under the intent exception in *Butcher v. State*.³²⁴ In this case, the court affirmed Butcher's child molestation conviction even though the trial court admitted evidence from two nieces about the defendant's past misconduct. The court relied on *Wickizer* and found that this defendant claimed a contrary intent, which allowed this evidence to be admitted under the intent exception.³²⁵ The defendant made a pre-trial statement to police that "something happened" in his daughter's bedroom.³²⁶ The court held that the defendant put his intent in issue and did not deny touching his daughter. He only said, at different times, that he was forced against his will and that he could not resist his daughter's advances.³²⁷ The court held that his version of events constituted a claim of contrary intent.³²⁸ The court

315. *Id.* at 186.

316. *Id.* at 188.

317. *Id.*

318. 626 N.E.2d 795, 801 (Ind. 1993).

319. *Id.* at 796.

320. *Id.* at 799.

321. *Id.* (citing *Hardin v. State*, 611 N.E.2d 123, 129 (Ind. 1993)).

322. *Id.*

323. *Id.* at 800-01.

324. 627 N.E.2d 855, 859 (Ind. Ct. App. 1994).

325. *Id.*

326. *Id.* at 858-59.

327. *Id.*

328. *Id.* at 859.

also held that the evidence met the balancing test of Indiana Rule 403 and was not so prejudicial as to deny Butcher a fair trial.³²⁹

However, in a case decided after *Butcher*, the court reversed a child molestation conviction in which prior sexual misconduct evidence was admitted, even though the defendant had put his intent in issue.³³⁰ Fisher was convicted of molesting his granddaughter. At his trial, the court allowed Fisher's daughter to testify that he had sexually abused her at least twenty-three years earlier.³³¹ Fisher also took the stand, saying that if anything improper had occurred, it was accidental.³³² The court here held that, in applying *Wickizer*, the admission of such evidence must be further limited by examining the remoteness of the conduct and its similarity to the alleged present offense. "A prior bad act, despite its remoteness, may still be relevant if it is strikingly similar to the charged offense."³³³ In *Fisher*, the court found that the daughter's abuse was too remote to be relevant,³³⁴ and that the similarity of the conduct did not overcome its remoteness in time.³³⁵

The common scheme or plan exception was examined in *Bolin v. State*.³³⁶ In *Bolin*, the defendant was convicted of arson for hire resulting in serious bodily injury.³³⁷ The defendant hired the same person to set both the fire for which the defendant was charged in this case, and another fire, for which the defendant was not charged.³³⁸ The trial court admitted into evidence testimony concerning the uncharged subsequent fire on the basis of the modus operandi branch of the common scheme or plan exception.³³⁹

The court held that two types of evidence may fit the common scheme or plan exception. The first is evidence to prove identity by showing that the defendant committed crimes with similar modus operandi.³⁴⁰ In this case, the acts must be so similar that they "can be considered akin to the accused's signature."³⁴¹ The State claimed that the uncharged fire was akin to the accused's signature because so many of the details were the same in both fires. The court disagreed, holding that commission of similar crimes is not enough to qualify for the exception.³⁴²

The second type of evidence under the common scheme or plan exception is evidence that demonstrates a common plan from which the accused originated the charged crime.³⁴³ The test is whether or not "the other offenses tend to establish a preconceived plan by

329. *Id.*

330. *Fisher v. State*, 641 N.E.2d 105 (Ind. Ct. App. 1994).

331. *Id.* at 107.

332. *Id.*

333. *Id.* at 109.

334. *Id.*

335. *Id.*

336. 634 N.E.2d 546, 548 (Ind. Ct. App. 1994).

337. *Id.* at 547.

338. *Id.*

339. *Id.*

340. *Id.* at 548.

341. *Id.* at 549 (citing *Penley v. State*, 506 N.E.2d 806, 809 (Ind. 1987)).

342. *Id.*

343. *Id.*

which the charged crime was committed.”³⁴⁴ The court determined that the evidence in this case did not meet this test either, because the evidence of uncharged arson did not result in completion of the present offense.³⁴⁵

The court reversed the conviction, holding that the State failed to establish a sufficient foundation for the admission of the misconduct evidence. The repeated commission of similar crimes is insufficient to qualify for the exception.³⁴⁶ Furthermore, the court held that because the similarity between the charged crime and the uncharged crime was so great, the error was not harmless and was likely to allow the jury to draw the “forbidden inference.”³⁴⁷

However, in *Gardner v. State*, the court affirmed the use of misconduct evidence to prove the defendant’s common scheme or plan.³⁴⁸ Gardner was convicted of burglarizing a residence and of being a habitual offender. He argued that the trial court erred when it admitted evidence of two other residential burglaries for which he was not charged.³⁴⁹ The court held that the burglaries were “nearly identical” to the charged offense: All three were committed on the same morning in rural secluded areas.³⁵⁰ Additionally, the burglar gained access to each home by breaking into the residence through the door. The court held that admitting such testimony was not improper.³⁵¹

The Indiana Supreme Court affirmed a murder conviction in which misconduct evidence was used to prove the defendant’s motive in *Elliott v. State*.³⁵² Elliott threatened to harm his ex-wife and her boyfriend, once leaving a telephone message for his ex-wife stating that he would “blow [her] brains out.”³⁵³ During a subsequent fight and struggle over a weapon, Elliott shot and killed the boyfriend. The trial court admitted evidence of Elliott’s past threats and statements, including the taped telephone conversation, to his ex-wife and to the victim, her boyfriend.³⁵⁴ The court held that the evidence was admissible “to show the relationship between the parties,” as well as Elliott’s motive, plan, and absence of mistake.³⁵⁵

Although misconduct evidence may never be used for the sole purpose of portraying a defendant as a person of bad character, it may be used to rebut specific factual claims made by the defense. In *Koo v. State*,³⁵⁶ Dr. Young Soo Koo was convicted of raping a female patient during a pelvic examination. Koo claimed that the trial court erred when it allowed two witnesses to testify regarding alleged prior uncharged acts of sexual

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* at 550.

348. 641 N.E.2d 641, 646 (Ind. Ct. App. 1994).

349. *Id.* at 643.

350. *Id.* at 646.

351. *Id.*

352. 630 N.E.2d 202, 205 (Ind. 1994).

353. *Id.* at 203.

354. *Id.* at 204.

355. *Id.*

356. 640 N.E.2d 95 (Ind. Ct. App. 1994).

misconduct.³⁵⁷ One former patient testified that in 1983, when she was twelve, she went to see Koo for an ear infection and that Koo had sex with her during a pelvic examination. She testified that she did not know of the rape until later, when she went to the restroom and discovered semen in her vaginal area.³⁵⁸ The other witness testified that in 1984, Koo asked her to undress for an examination, taped her legs to stirrups and had sex with her against her will.³⁵⁹

At trial, Koo defended himself by insisting that the patient who accused him in this case hallucinated the sexual encounter.³⁶⁰ The court held that "the defense had presented a specific factual claim of hallucination that the prosecution was entitled to rebut with evidence of prior misconduct."³⁶¹ Furthermore, the court instructed the jury that the testimony of the two witnesses was admitted for the limited purpose of helping the jury decide if the testimony of the victim was based in reality or fantasy.³⁶² The court also reminded the jury that Koo was only on trial for the alleged rape of the victim.³⁶³ With such precautions, the court found that the evidence admitted was not more prejudicial than probative.³⁶⁴

However, in *James v. State*,³⁶⁵ the court reversed the defendant's conviction after finding that misconduct evidence was admitted solely to prove his bad character. At trial, the State referred to his prior encounters with police, his former imprisonment on a drug conviction, and his status as a probationer to prove knowledge and intent to possess drugs.³⁶⁶ The court relied on *Haynes v. State*, where a conviction was reversed because the trial court admitted evidence of the defendant's prior drug transactions to prove knowledge and intent.³⁶⁷ The *Haynes* court held that "to admit the extrinsic offense testimony . . . was to admit evidence of a point not in issue."³⁶⁸

The *James* court held that the evidence was irrelevant to the present case because knowledge and intent were not issues of genuine dispute.³⁶⁹ "The steady drumbeat of the deputy prosecutor's references to James's prior conviction, bad acts, and probation status repeatedly reminded the jury that James was a person of bad character."³⁷⁰

357. *Id.* at 95.

358. *Id.* at 100.

359. *Id.*

360. *Id.* at 101-02.

361. *Id.*

362. *Id.* at 102.

363. *Id.*

364. *Id.*

365. 622 N.E.2d 1303 (Ind. Ct. App. 1993).

366. *Id.* at 1307.

367. *Id.* at 1308-09 (citing *Haynes v. State*, 578 N.E.2d 369, 370-71 (Ind. Ct. App. 1991)).

368. *Id.* at 1309 (citing *Haynes*, 578 N.E.2d at 370).

369. *Id.* at 1309.

370. *Id.* at 1310.

AN EXAMINATION OF THE INDIANA SUPREME COURT DOCKET, DISPOSITIONS, AND VOTING IN 1994*

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Even though the Indiana Supreme Court is clearly now functioning under its modern docket, the loss of a Justice who was a mainstay of the "old order" will still cause a great void and result in a different case load next year for each individual justice. This is one of the primary findings from this fourth annual examination of the Indiana Supreme Court's docket, dispositions, and voting.

The retirement of Justice Givan, who began the process of reform, will cause a shift to occur in the case load of criminal appeals, especially direct criminal appeals. Again in 1994, he was the most prolific justice in the criminal appeals area with thirty-five such opinions. This number more than doubled the number of opinions written in this area by each of the other justices individually. Justice Givan was also the most productive justice overall, with thirty-nine total opinions. Newly sworn-in Justice Sullivan was next with thirty-three total opinions. Chief Justice Shepard followed with thirty-one. The shift of Justice Givan's heavy case load in direct criminal appeals will be especially felt by his former fellow justices because they all showed a proclivity last year and in previous years to work on civil matters. Three of the other justices had a higher production last year of civil opinions than criminal opinions.

The modern docket of the supreme court was fully realized in another way this year when the court began voting on direct criminal appeals in conference prior to any opinion being written.¹ Previously, because of the overwhelming caseload of the court, direct criminal appeals went directly to an individual justice (mostly, Justice Givan) who drafted the opinion and then circulated the opinion to the other justices for a vote. As this year's and all previous years' Table A shows, Justice Givan drafted the great majority of the

* The Tables presented in this Article are patterned after the annual statistics of the United States Supreme Court published in the *Harvard Law Review*. An explanation of the origin of these Tables can be found at Louis Henkin, *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 301 (1968). The *Harvard Law Review* granted permission for the use of these Tables by the *Indiana Law Review* this year; however, permission for any further reproduction of these Tables must be obtained from the *Harvard Law Review*.

We thank Krieg DeVault Alexander & Capehart for its gracious willingness to devote the time, energy, and resources of its law firm to allow such a project as this to be accomplished. As is appropriate, credit for the idea for this project goes to Chief Justice Shepard; but, of course, any errors or omissions belong to his former law clerk. We also thank WESTLAW® for its kind willingness to allow us free access to its computer resources and assistance in preparing these Tables.

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1. This change in the internal policy was revealed by Chief Justice Shepard in a conversation on May 9, 1995. See also Randall T. Shepard, *Changing the Constitutional Jurisdiction of the Indiana Supreme Court: Letting a Court of Last Resort Act Like One*, 63 IND. L.J. 669 (1988); Randall T. Shepard, *Foreword: Indiana Law, the Supreme Court, and a New Decade*, 24 IND. L. REV. 499 (1991) [hereinafter *Foreword*].

court's opinions on direct criminal appeals. With the retirement of Justice Givan, these cases will be shifted to the other justices.

The following is a brief description of the highlights from each Table.

Table A. Besides being the most prolific drafter of majority opinions, Justice Givan of recent years also became the most prolific drafter of dissents. This year was no exception. He again dissented more than any other justice with twenty-eight overall and the most in each of the civil and criminal areas.

Table B-1. Justice Sullivan, who filled the position left by Justice Krahulik, seems to have taken up where Justice Krahulik left off. Justice Sullivan was not only the second-most productive in number of opinions but also was, like Justice Krahulik, the most often aligned with Chief Justice Shepard in civil cases. Chief Justice Shepard and Justice Sullivan agreed in 95% of all civil cases handed down by the court in 1994. This high-level of alignment was closely followed by Justices Sullivan and DeBruler's agreement rate of 94.8%. The least aligned in civil cases were Justices Givan and Sullivan at 82.3%. Surprisingly, Justice DeBruler was the most aligned overall with his fellow justices in civil opinions. He was closely followed by the Chief Justice. Justice Givan was the least aligned overall.

Table B-2. As for criminal cases, Chief Justice Shepard and Justice Dickson were the two most aligned justices at 89.2%. This was followed by the Chief Justice and Justice Sullivan at 85.5%. As usual, Justices Givan and DeBruler were the least aligned on criminal cases at 61.9%. Chief Justice Shepard was the most aligned overall with his fellow justices, and Justice Givan was the least aligned overall.

Table B-3. For all cases, Chief Justice Shepard and Justice Sullivan were the two most aligned justices at 91.1%, closely followed by Justices DeBruler and Sullivan at 89.5%. As usual, the two least aligned were Justices Givan and DeBruler at 76.2%. The most aligned justice with his fellow justices overall was Chief Justice Shepard and the least aligned was Justice Givan.

Table C. Although the supreme court was unanimous, or unanimous with a concurrence, in 66% of its opinions, this number is reduced to 56% when the attorney discipline cases are subtracted. In attorney discipline cases, the court follows a long-standing internal policy to reach unanimity if at all possible to speak with one voice on ethical and professional duties of attorneys. In these types of cases, the court also generally accepts agreed judgments that have been negotiated by the parties involved. Leaving out attorney discipline cases, the court's percentage of opinions with at least one dissent was 44%.

Table D. Interestingly, for the four years of this study, the supreme court has held steady at between 24 to 26 split opinions each year. In 1994, there were 26 3-2 opinions. Chief Justice Shepard, and Justices Givan and Dickson formed the majority the most times in 9 of those 3-2 opinions, 6 of which were criminal matters. Chief Justice Shepard, and Justices Givan and Sullivan formed the 3-justice majority in 4 split opinions, all of which were criminal matters. Individually, Chief Justice Shepard was most frequently in the 3-justice majority in 20 of the 26 split opinions. Justice Givan was next with 17.

Table E. The Indiana Supreme Court was evenly divided in its affirmance and reversal of all cases coming to it from a trial court or the court of appeals; 50% were affirmed, and 50% were reversed. The highest percentage of affirmance was, as expected, found in the area of direct appeals of criminal matters; and, the lowest percentage of affirmance was in criminal appeals accepted for transfer. The court affirmed far more

civil cases accepted for transfer than in past years. In 1994, the court affirmed 42% of such opinions while only affirming about 14% in each of the two previous years.

The court's docket of cases coming from a trial court or the court of appeals had 50 civil matters and 83 criminal matters, 55 of which were direct criminal appeals. According to the Indiana Supreme Court Annual Report, the court handled 329 petitions to transfer of civil matters and denied 256 (78%), dismissed 7 (2%), and granted 66 (20%). As to transfers, the court also began another new practice. According to the court's administrator's office, the court will now customarily issue an order accepting transfer prior to handing down an opinion. Previously, the court would only acknowledge the acceptance of transfer in the opinion when it was handed down.

Table F. The court continues to show a strong interest in the Indiana Constitution with seven cases dealing in that kind of jurisprudence.

TABLE A

OPINIONS^a

	OPINIONS OF COURT ^b			CONCURRENCES ^c			DISSENTS ^d		
	Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total
Shepard, C.J. ^e	13	18	31	5	2	7	2	4	6
DeBruler, J. ^e	13	7	20	9	3	12	13	6	19
Givan, J.	35	4	39	1	1	2	15	13	28
Dickson, J. ^e	8	10	18	2	2	4	4	10	14
Sullivan, J. ^e	15	18	33	4	3	7	9	7	16
Per Curiam	0	50	50						
Total	84	107	191	21	11	32	43	40	83

^a These are opinions and votes on opinions by each justice and in per curiam in the 1994 term. The Indiana Supreme Court is unique because it is the only supreme court to assign each case to a justice by a consensus method. Cases are distributed by a consensus of the justices in the majority on each case either by volunteering or nominating writers. The chief justice does not have any power to control the assignments other than as a member of the majority. *See Melinda Gann Hall, Opinion Assignment Procedures and Conference Practices in State Supreme Courts*, 73 JUDICATURE 209 (1990). The order of discussion and voting is started by the most junior member of the court and follows reverse seniority. *Id.* at 210.

^b Plurality opinions that announce the judgment of the court are counted as opinions of the court. This is only a counting of full opinions written by each justice. It includes opinions on civil, criminal, and original actions and disciplinary matters. It does not include rehearing opinions, nor does it include the per curiam opinions given credit to each justice by the Indiana Supreme Court Annual Report ("the Report"). The per curiam opinions are released publicly with no justice named as the author, but the Report gives credit to the justice who actually wrote the opinion. For the purposes of this Table, per curiam opinions are not counted for an individual justice because the public has no method of knowing which justice wrote the opinion. In addition, the court also handed down 65 orders or opinions on attorney disciplinary matters. Of those 65 orders or opinions, 48 were handed down as per curiam opinions and the others were signed by individual justices.

^c This category includes both written concurrences and votes to concur in result only.

^d This category includes both written dissents and votes to dissent without opinion. Opinions concurring in part and dissenting in part or opinions concurring in part only and differing on another issue are counted as dissents.

^e Chief Justice Shepard did not participate in one case—*Moran v. State*, 644 N.E.2d 536 (Ind. 1994). Justice DeBruler did not participate in three opinions—*In re Klagiss*, 635 N.E.2d 163 (Ind. 1944); *Pivarnik v. NIPSCO*, 636 N.E.2d 131 (Ind. 1994); *In re Anonymous*, 641 N.E.2d 31 (Ind. 1994). Justice Dickson did not participate in two cases—*In re Stults*, 636 N.E.2d 1262 (Ind. 1994); *In re Bauer*, 640 N.E.2d 1050 (Ind. 1994). Justice Sullivan did not participate in two opinions—*In re Garringer*, 626 N.E.2d 809 (Ind. 1994); *Indiana Dep't of Public Welfare v. Teckenbrock*, 643 N.E.2d 306 (Ind. 1944).

TABLE B-1**VOTING ALIGNMENTS FOR CIVIL CASES^f**

	Sullivan, J.	Dickson, J.	Givan, J.	DeBruler, J.	Shepard, C.J.
Shepard, C.J.	O 111	104	103	110	
	S 2	0	0	1	
	D 113	104	103	111	---
	N 119	119	121	118	
P 95.0%		87.4%	85.1%	94.0%	
DeBruler, J.	O 107	102	101		110
	S 3	0	1		1
	D 110	102	102	---	111
	N 116	116	118		118
P 94.8%		87.9%	86.4%		94.0%
Givan, J.	O 98	99		101	103
	S 0	3		1	0
	D 98	102	---	102	103
	N 119	119		118	121
P 82.3%		85.7%		86.4%	85.1%
Dickson, J.	O 101		99	102	104
	S 1		3	0	0
	D 102	---	102	102	104
	N 117		119	116	119
P 87.1%		85.7%		87.9%	87.4%
Sullivan, J.	O 101		98	107	111
	S 1		0	3	2
	D ---	102	98	110	113
	N 117		119	116	119
P 87.1%		82.3%		94.8%	95.0%

^f This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only civil cases. For example, in the top set of numbers for Chief Justice Shepard, 111 is the number of times Chief Justice Shepard and Justice Sullivan agreed in a full majority opinion in a civil case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-2
VOTING ALIGNMENTS FOR CRIMINAL CASES^g

	Sullivan, J.	Dickson, J.	Givan, J.	DeBruler, J.	Shepard, C.J.
Shepard, C.J.	O 71	74	66	65	
	S 0	0	1	0	
	D 71	74	67	65	---
	N 83	83	83	83	
	P 85.5%	89.2%	80.7%	78.3%	
DeBruler, J.	O 63	65	52		65
	S 6	5	0		0
	D 69	70	52	---	65
	N 84	84	84		83
	P 82.1%	83.3%	61.9%		78.3%
Givan, J.	O 60	60		52	66
	S 2	0		0	1
	D 62	60	---	52	67
	N 84	84		84	83
	P 73.8%	71.4%		61.9%	80.7%
Dickson, J.	O 66		60	65	74
	S 1		0	5	0
	D 67	---	60	70	74
	N 84		84	84	83
	P 79.7%		71.4%	83.3%	89.2%
Sullivan, J.	O 66	60		63	71
	S 1	2		6	0
	D ---	67	62	69	71
	N 84	84		84	83
	P 79.7%	73.8%		82.1%	85.5%

^g This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for only criminal cases. For example, in the top set of numbers for Chief Justice Shepard, 71 is the number of times Chief Justice Shepard and Justice Sullivan agreed in a full majority opinion in a criminal case. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE B-3**VOTING ALIGNMENTS FOR ALL CASES^b**

	Sullivan, J.	Dickson, J.	Givan, J.	DeBruler, J.	Shepard, C.J.
Shepard, C.J.	O 182	178	169	175	
	S 2	0	1	1	
	D 184	178	170	176	---
	N 202	202	204	201	
	P 91.1%	88.1%	83.3%	87.6%	
DeBruler, J.	O 170	167	153		175
	S 9	5	1		1
	D 179	172	154	---	176
	N 200	200	202		201
	P 89.5%	86.0%	76.2%		87.6%
Givan, J.	O 158	159		153	169
	S 2	3		1	1
	D 160	162	---	154	170
	N 203	203		202	204
	P 78.8%	79.8%		76.2%	83.3%
Dickson, J.	O 167		159	167	178
	S 2		3	5	0
	D 169	---	162	172	178
	N 201		203	200	202
	P 84.1%		79.8%	86.0%	88.1%
Sullivan, J.	O	167	158	170	182
	S	2	2	9	2
	D	---	169	179	184
	N		201	203	202
	P	84.1%	78.8%	89.5%	91.1%

^b This Table records the number of times that one justice voted with another in full-opinion decisions, including per curiam, for all cases. For example, in the top set of numbers for Chief Justice Shepard, 182 is the number of times Chief Justice Shepard and Justice Sullivan agreed in all full majority opinions written by the court in 1994. Two justices are considered to have agreed whenever they joined the same opinion, as indicated by either the reporter or the explicit statement of a justice in the body of his or her own opinion. The Table does not treat two justices as having agreed if they did not join the same opinion, even if they agreed in the result of the case or wrote separate opinions revealing little philosophical disagreement.

“O” represents the number of times that the two justices agreed in opinions of the court or opinions announcing the judgment of the court.

“S” represents the number of times the two justices agreed in separate opinions, including agreements in both concurrences and dissents.

“D” represents the number of decisions in which the two justices agreed in either a majority, dissenting, or concurring opinion.

“N” represents the number of decisions in which both justices participated and thus the number of opportunities for agreement.

“P” represents the percentage of decisions in which one justice agreed with another justice, calculated by dividing “D” by “N.”

TABLE C**UNANIMITY^j**

			Unanimous			Opinions			
Unanimous ^j			With Concurrence ^k			With Dissent			Total
Criminal	Civil	Total	Criminal	Civil	Total	Criminal	Civil	Total	
33	79	112 (55%)	14	8	22 (11%)	37	34	71 (35%)	205

^j This Table tracks the number and percent of unanimous opinions among all opinions written. If, for example, only four justices participate and all concur, it is still considered unanimous. It also tracks the percentage of overall opinions with concurrence and overall opinions with dissent.

^k A decision is considered unanimous only when all justices participating in the case voted to concur in the court's opinion as well as its judgment. When one or more justices concurred in the result but not in the opinion, the case is not considered unanimous. Of the 79 unanimous civil cases, 55 dealt with attorney discipline. Subtracting the 65 total attorney discipline cases from the above numbers (10 of which had dissents and 55 of which were unanimous), the percentage of unanimous opinions is reduced to 41% and the percentage of opinions with a dissent is increased to 44%.

^k A decision is listed in this column if one or more justices concurred in the result but not in the opinion of the court or wrote a concurrence, and there were no dissents.

TABLE D**3-2 DECISIONS^l**

Justices Constituting the Majority	Number of Opinions^m
1. Shepard, C.J., Givan, J., Dickson, J.	9
2. Shepard, C.J., Givan, J., Sullivan, J.	4
3. Shepard, C.J., DeBruler, J., Sullivan, J.	3
4. DeBruler, J., Givan, J., Dickson, J.	3
5. Shepard, C.J., DeBruler, J., Dickson, J.	2
6. Shepard, C.J., DeBruler, J., Givan, J.	1
7. Shepard, C.J., Dickson, J., Sullivan, J.	1
8. DeBruler, J., Dickson, J., Sullivan, J.	1
9. Givan, J., Dickson, J., Sullivan, J.	1
Totalⁿ	26

^l This Table concerns only decisions rendered by full opinion. An opinion is counted as a 3-2 decision if two justices voted to decide the case in a manner different from that of the majority of the court.

^m This column lists the number of times each 3-justice group constituted the majority in a 3-2 decision.

ⁿ The 1994 term's 3-2 decisions were:

1. Shepard, C.J., Givan, J., Dickson, J.: *Radcliff v. County of Harrison*, 627 N.E.2d 1305 (Ind. 1994) (Givan, J.); *Stidham v. State*, 637 N.E.2d 140 (Ind. 1994) (Givan, J.); *Indiana Dep't of Revenue v. Bethlehem Steel*, 639 N.E.2d 264 (Ind. 1994) (Shepard, C.J.); *Tidmore v. State*, 637 N.E.2d 1290 (Ind. 1994) (Givan, J.); *Splunge v. State*, 641 N.E.2d 628 (Ind. 1994) (Givan, J.); *Holmes v. State*, 642 N.E.2d 970 (Ind. 1994) (Givan, J.); *James v. State*, 643 N.E.2d 321 (Ind. 1994) (Givan, J.); *Lambert v. State*, 643 N.E.2d 349 (Ind. 1994) (Givan, J.); *Parr v. Parr*, 644 N.E.2d 548 (Ind. 1994) (Givan, J.).
2. Shepard, C.J., Givan, J., Sullivan, J.: *State v. Albright*, 632 N.E.2d 725 (Ind. 1994) (Givan, J.); *Barnes v. State*, 634 N.E.2d 46 (Ind. 1994) (Givan, J.); *Evans v. State*, 643 N.E.2d 877 (Ind. 1994) (Shepard, C.J.); *Bryant v. State*, 644 N.E.2d 859 (Ind. 1994) (Sullivan, J.).
3. Shepard, C.J., DeBruler, J., Sullivan, J.: *In re Helman*, 640 N.E.2d 1063 (Ind. 1994) (per curiam); *Natural Resources Comm'n v. Amax Coal Co.*, 638 N.E.2d 418 (Ind. 1994) (DeBruler, J.); *Kosciusko Bd. of Zoning Appeals v. Wygant*, 644 N.E.2d 112 (Ind. 1994) (DeBruler, J.).
4. DeBruler, J., Givan, J., Dickson, J.: *In re Turner*, 631 N.E.2d 918 (Ind. 1994) (per curiam); *In re Scionti*, 630 N.E.2d 1358 (Ind. 1994) (per curiam); *In re Atanga*, 636 N.E.2d 1253 (Ind. 1994) (per curiam).
5. Shepard, C.J., DeBruler, J., Dickson, J.: *Townsend v. State*, 632 N.E.2d 727 (Ind. 1994) (DeBruler, J.); *Lowery v. State*, 640 N.E.2d 1031 (Ind. 1994) (DeBruler, J.).
6. Shepard, C.J., DeBruler, J., Givan, J.: *Collins v. Covenant Mutual Ins. Co.*, 644 N.E.2d 116 (Ind. 1994) (Shepard, C.J.).
7. Shepard, C.J., Dickson, J., Sullivan, J.: *Kimberlin v. DeLong*, 637 N.E.2d 1211 (Ind. 1994) (Dickson, J.).
8. DeBruler, J., Dickson, J., Sullivan, J.: *Roark v. State*, 644 N.E.2d 565 (Ind. 1994) (Sullivan, J.).
9. Givan, J., Dickson, J., Sullivan, J.: *Star Bank, N.A. Southeastern Ind. v. Laker*, 637 N.E.2d 805 (Givan, J.).

TABLE E**DISPOSITION OF CASES REVIEWED BY TRANSFER
AND DIRECT APPEALS^o**

	Reversed or Vacated ^p	Affirmed	Total
Civil Appeals Accepted for Transfer	26 (57%)	19 (42%)	45
Direct Civil Appeals	3 (60%)	2 (40%)	5
Criminal Appeals Accepted for Transfer	25 (89%)	3 (11%)	28
Direct Criminal Appeals	12 (23%)	43 (77%)	55
Total	66 (50%)	67 (50%)	133 ^q

^o Direct criminal appeals are cases in which the trial court imposed a sentence of greater than 50 years. See IND. CONST. art. VII, § 4. Direct criminal appeals reach the supreme court directly from the trial court. A civil appeal may also come directly from the trial court. See IND. R. APP. P. 4(A) (entitled Rules of Procedure for Original Actions). All other Indiana Supreme Court opinions are accepted for transfer from the Indiana Court of Appeals. See IND. R. APP. P. 11(B). The court's transfer docket, especially civil cases, has substantially increased in the past 5 years. See Shepard, *Foreword*, *supra* note 1.

^p Generally, the term "vacate" is used by the Indiana Supreme Court when it is reviewing a court of appeals opinion, while the term "reverse" is used when the court overrules a trial court decision. In reviewing this Table, it should be noted that the court technically "vacates" every court of appeals opinion that it accepts for transfer, but may only disagree with a small portion of the reasoning while agreeing with the result. See IND. R. APP. P. 11(B)(3). As a practical matter, "reverse" or "vacate" simply represents any action by the court that does not affirm the trial court or court of appeals opinion.

^q This does not include 65 attorney discipline opinions, four writs of mandamus or prohibition, two cases relating to certified questions from the United States District Court for the Southern District of Indiana, and one miscellaneous case. These opinions were not reversed, vacated, nor affirmed.

TABLE F**SUBJECT AREAS OF SELECTED DISPOSITIONS
WITH FULL OPINIONS^r**

	Number
Original Actions	
• Certified Questions	2 ^s
• Writs of Mandamus or Prohibition	5 ^t
• Attorney Discipline	65 ^u
Criminal	
• Death Penalty	8 ^v
• Fourth Amendment or Search and Seizure	4 ^w
• Writ of Habeas Corpus	1 ^t
Emergency Appeals to the Supreme Court	0
Trusts, Estates or Probate	3 ^x
Real Estate or Real Property	6 ^y
Landlord-Tenant	0
Divorce or Child Support	8 ^z
Children in Need of Services (CHINS)	0
Paternity	2 ^{aa}
Product Liability or Strict Liability	1 ^{bb}
Negligence or Personal Injury	12 ^{cc}
Indiana Tort Claims Act	2 ^{dd}
Statute of Limitations or Statute of Repose	1 ^{ee}
Tax, Department of State Revenue, or State Board of Tax Commissioners	2 ^{ff}
Contracts	8 ^{gg}
Corporate Law or the Indiana Business Corporation Law	2 ^{hh}
Uniform Commercial Code	1 ⁱⁱ
Banking Law	2 ^{jj}
Employment Law	7 ^{kk}
First Amendment, Open Door Law, or Public Records Law	0
Indiana Constitution	7 ^{ll}

This Table is designed to provide a general idea of the specific subject areas upon which the court ruled or discussed and how many times it did so in 1994. It also provides a quick-reference guide to court rulings for practitioners in specific areas of the law. The numbers corresponding to the areas of law reflect the number of cases in which the court substantively discussed legal issues about these subject areas. A citation list is provided in a footnote for each area.

^s Shook Heavy & Envtl. Constr. Group v. City of Kokomo, 632 N.E. 355 (Ind. 1994); Baker v. Westinghouse, 637 N.E.2d 1271 (Ind. 1994).

^t Miller v. Lowrance, 629 N.E.2d 846 (Ind. 1994); State *ex rel.* Corll. v. Wabash Circuit Court, 631 N.E.2d 914 (Ind. 1994); State *ex rel.* Camden v. The Gibson Circuit Court & The Honorable Walter Palmer, 640 N.E.2d 696 (Ind. 1994); State *ex rel.* Samuel Jacobs v. Marion Circuit Court, 644 N.E.2d 852 (Ind. 1994); State *ex rel.* Meade v. Marshall Superior Court II, 644 N.E.2d 287 (Ind. 1994).

^u *In re Turner*, 631 N.E.2d 918 (Ind. 1994); *In re Scionti*, 630 N.E.2d 1358 (Ind. 1994); *In re Hughes*, 630 N.E.2d 1354 (Ind. 1994); *In re Schumate*, 634 N.E.2d 1333 (Ind. 1994); *In re Burchett*, 630 N.E.2d 205 (Ind. 1994); *In re Chavez*, 634 N.E.2d 499 (Ind. 1994); *In re Hanley*, 627 N.E.2d 800 (Ind. 1994); *In re Chappell*, 627 N.E.2d 441 (Ind. 1994); *In re Helmer*, 634 N.E.2d 56 (Ind. 1994); *In re Bates*, 635 N.E.2d 153 (Ind. 1994); *In re Jordan*, 634 N.E.2d 1333 (Ind. 1994); *In re Garringer*, 626 N.E.2d 809 (Ind. 1994); *In re Briscoe*, 629 N.E.2d 851 (Ind. 1994); *In re Foster*, 630 N.E.2d 562 (Ind. 1994); *In re Caslan*, 632 N.E.2d 344 (Ind. 1994); *In re Anonymous*, 630 N.E.2d 212 (Ind. 1994); *In re Pitschke*, 627 N.E.2d 440 (Ind. 1994); *In re Welborn*, 634 N.E.2d 54 (Ind. 1994); *In re Kieser*, 631 N.E.2d 916 (Ind. 1994); *In re Lebamoff*, 630 N.E.2d 560 (Ind. 1994); *In re Anast*, 634 N.E.2d 493 (Ind. 1994); *In re Gerard*, 634 N.E.2d 51 (Ind. 1994); *In re Gerde*, 634 N.E.2d 494 (Ind. 1994); *In re Putsey*, 634 N.E.2d 497 (Ind. 1994); *In re Grotrian*, 626 N.E.2d 807 (Ind. 1994); *In re Trueblood*, 633 N.E.2d 248 (Ind. 1994); *In re Antcliff*, 629 N.E.2d 848 (Ind. 1994); *In re Schreiber*, 632 N.E.2d 362 (Ind. 1994); *In re Watson*, 630 N.E.2d 1354 (Ind. 1994); *In re Good*, 632 N.E.2d 719 (Ind. 1994); *In re Meachem*, 630 N.E.2d 564 (Ind. 1994); *In re Watson*, 636 N.E.2d 1261 (Ind. 1994); *In re Shumate*, 634 N.E.2d 1333 (Ind. 1994); *In re Bates*, 635 N.E.2d 1096 (Ind. 1994); *In re Brown*, 636 N.E.2d 1249 (Ind. 1994); *In re Oullette*, 636 N.E.2d 1251 (Ind. 1994); *In re Anonymous*, 637 N.E.2d 131 (Ind. 1994); *In re Levy*, 637 N.E.2d 795 (Ind. 1994); *In re Atanga*, 636 N.E.2d 1253 (Ind. 1994); *In re Stultz*, 636 N.E.2d 1262 (Ind. 1994); *In re Klagiss*, 635 N.E.2d 163 (Ind. 1994); *In re Angleton*, 638 N.E.2d 1257 (Ind. 1994); *In re Watson*, 640 N.E.2d 1023 (Ind. 1994); *In re Bauer*, 640 N.E.2d 1050 (Ind. 1994); *In re Chovanec*, 640 N.E.2d 1052 (Ind. 1994); *In re Turner*, 641 N.E.2d 31 (Ind. 1994); *In re Gillaspy*, 640 N.E.2d 1054 (Ind. 1994); *In re Kerr*, 640 N.E.2d 1056 (Ind. 1994); *In re Kingma-Piper*, 640 N.E.2d 1060 (Ind. 1994); *In re Hughes*, 640 N.E.2d 1065 (Ind. 1994); *In re Helman*, 640 N.E.2d 1063 (Ind. 1994); *In re Anonymous*, 641 N.E.2d 31 (Ind. 1994); *In re Woods*, 638 N.E.2d 1253 (Ind. 1994); *In re Bock*, 635 N.E.2d 166 (Ind. 1994); *In re Lahey*, 637 N.E.2d 811 (Ind. 1994); *In re Vested*, 638 N.E.2d 431 (Ind. 1994); *In re Corn*, 638 N.E.2d 791 (Ind. 1994); *In re Hamilton*, 642 N.E.2d 1364 (Ind. 1994); *In re Wright*, 642 N.E.2d 981 (Ind. 1994); *In re Relphorde*, 644 N.E.2d 874 (Ind. 1994); *In re Fairman*, 644 N.E.2d 862 (Ind. 1994); *In re McLin*, 644 N.E.2d 100 (Ind. 1994); *In re Frosch*, 643 N.E.2d 902 (Ind. 1994); *In re Pope*, 644 N.E.2d 90 (Ind. 1994); *In re Angleton*, 642 N.E.2d 1367 (Ind. 1994); *In re Stults*, 644 N.E.2d 1239 (Ind. 1994).

^v *Wallace v. State*, 640 N.E.2d 374 (Ind. 1994), *aff'g* (post conviction relief); *Lowery v. State*, 640 N.E.2d 1031 (Ind. 1994), *aff'g* (post conviction relief); *State v. Alcorn*, 638 N.E.2d 1242 (Ind. 1994), *rev'g* on grounds other than death penalty (direct appeal); *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994), *aff'g* (direct appeal); *Burris v. State*, 642 N.E.2d 961 (Ind. 1994), *aff'g* (direct appeal); *Lambert v. State*, 643 N.E.2d 349 (Ind. 1994), *aff'g* (post conviction relief); *Roark v. State*, 644 N.E.2d 565 (Ind. 1994), *rev'g* (direct appeal); *State v. Huffman*, 643 N.E.2d 899 (Ind. 1994), *aff'g* grant of post conviction relief.

^w *State v. Albright*, 632 N.E.2d 725 (Ind. 1994); *Esquerdo v. State*, 640 N.E.2d 1023 (Ind. 1994); *William Perry v. State*, 638 N.E.2d 1236 (Ind. 1994); *Moran v. State*, 644 N.E.2d 536 (Ind. 1994).

^x *Taylor v. Taylor, et al.*, 643 N.E.2d 893 (Ind. 1994); *In re Della Lustgarten Nathan Trust*, 638 N.E.2d 789 (Ind. 1994); *Culver-Union Twp. Ambulance Serv. v. Steindler*, 629 N.E.2d 1231 (Ind. 1994).

^y *Whiteacre v. State*, 629 N.E.2d 1236 (Ind. 1994); *Chidester v. City of Hobart*, 631 N.E.2d 908 (Ind. 1994); *McCorry v. G. Cowser Constr., Inc.*, 644 N.E.2d 550 (Ind. 1994); *Kosciusko Bd. of Zoning Appeals v. Wygant*, 644 N.E.2d 112 (Ind. 1994); *Premier Invs. v. Suites of Am., Inc.*, 644 N.E.2d 124 (Ind. 1994); *Estate of Reasor v. Putnam Cty.*, 635 N.E.2d 153 (Ind. 1994).

^z *Kinsey v. Kinsey*, 640 N.E.2d 42 (Ind. 1994); *Gipson v. Gipson*, 644 N.E.2d 876 (Ind. 1994); *Straub v. B.M.T.*, 645 N.E.2d 597 (Ind. 1994); *Parr v. Parr*, 644 N.E.2d 548 (Ind. 1994); *State ex rel. Meade v. Marshall Superior Court II*, 644 N.E.2d 287 (Ind. 1994); *Levin v. Levin*, 645 N.E.2d 601 (Ind. 1994); *Taylor v. Taylor*, 643 N.E.2d 893 (Ind. 1994); *McGinley-Ellis v. Ellis*, 638 N.E.2d 1249 (Ind. 1994).

^{aa} Gipson v. Gipson, 644 N.E.2d 876 (Ind. 1994); Straub v. B.M.T., 645 N.E.2d 597 (Ind. 1994).

^{bb} Reed v. Central Soya, 644 N.E.2d 84 (Ind. 1994).

^{cc} Wolf v. Kajima Int'l, Inc., 629 N.E.2d 1237 (Ind. 1994); Culver-Union Twp. Ambulance Serv. v. Steindler, 629 N.E.2d 1231 (Ind. 1994); Estate of Reasor v. Putnam County, 635 N.E.2d 153 (Ind. 1994); Cua v. Morrison, 636 N.E.2d 1248 (Ind. 1994); Kimberlin v. DeLong, 637 N.E.2d 1211 (Ind. 1994); Jacob *et al.* v. Chaplin *et al.*, 639 N.E.2d 1010 (Ind. 1994); Pivarnik v. Nipsco, 636 N.E.2d 131 (Ind. 1994); Mullin v. City of South Bend, 639 N.E.2d 278 (Ind. 1994); Bonnes v. Feldner, M.D. *et al.*, 642 N.E.2d 217 (Ind. 1994); Hooks SuperX, Inc. v. McLaughlin, 642 N.E.2d 514 (Ind. 1994); Reed v. Central Soya, 644 N.E.2d 84 (Ind. 1994).

^{dd} Baker v. Westinghouse, 637 N.E.2d 1271 (Ind. 1994); Mullin v. City of South Bend, 639 N.E.2d 278 (Ind. 1994).

^{ee} Indiana Dep't of State Revenue v. Horizon Bancorp, 644 N.E.2d 870 (Ind. 1994).

^{ff} Indiana Dep't of Revenue v. Bethlehem Steel, 639 N.E.2d 264 (Ind. 1994), *aff'g*; Indiana Dep't of State Revenue v. Horizon Bancorp, 644 N.E.2d 870 (Ind. 1994), *rev'g*.

^{gg} Straub v. B.M.T., 645 N.E.2d 597 (Ind. 1994); Aronson v. Price, 644 N.E.2d 864 (Ind. 1994); Hutchinson, Shockey, Erley & Co. v. Evansville-Vanderburgh Cty. Bldg. Auth., 644 N.E.2d 1228 (Ind. 1994); Premier Invs. v. Suites of Am., Inc., 644 N.E.2d 124 (Ind. 1994); Jarboe v. Landmark Community Newspapers of Ind., Inc., 644 N.E.2d 118 (Ind. 1994); PSI Energy, Inc. v. Amax, Inc., 644 N.E.2d 96 (Ind. 1994); Winkler v. V.G. Reed & Sons, 638 N.E.2d 1228 (Ind. 1994); Estate of Reasor v. Putnam Cty., 635 N.E.2d 153 (Ind. 1994).

^{hh} Aronson v. Price, 644 N.E.2d 864 (Ind. 1994); Winkler v. V.G. Reed & Sons, Inc., 638 N.E.2d 1228 (Ind. 1994).

ⁱⁱ Gibson County Farm Bureau Coop. Ass'n, Inc. v. Norman Greer and Miles, Inc., d/b/a Miles Farm Ctr., 643 N.E.2d 313 (Ind. 1994).

^{jj} Indiana Dep't of State Revenue v. Horizon Bancorp, 1994 644 N.E.2d 870 (Ind. 1994); Hutchinson, Shockey, Erley & Co. v. Evansville-Vanderburgh Cty. Bldg. Auth., 644 N.E.2d 870 (Ind. 1994).

^{kk} Jarboe v. Landmark Community Newspapers of Ind., Inc., 644 N.E.2d 118 (Ind. 1994); Claywell v. Review Bd. of the Ind. Dep't of Empl. & Training Servs., 643 N.E.2d 330 (Ind. 1994); Collins v. Day, 644 N.E.2d 72 (Ind. 1994); Winkler v. V.G. Reed & Sons, 638 N.E.2d 1228 (Ind. 1994); Foshee v. Shoney's, Inc., 637 N.E.2d 1277 (Ind. 1994); Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271 (Ind. 1994); Perry v. Stitzer Buick GMC, Inc., 637 N.E.2d 1281 (Ind. 1994).

^{ll} Walker v. State, 632 N.E.2d 723 (Ind. 1994); State v. Alcorn, 638 N.E.2d 1242 (Ind. 1994); Bivins v. State, 642 N.E.2d 928 (Ind. 1994); The Ind. Gaming Comm'n v. Moseley *et al.*, 643 N.E.2d 296 (Ind. 1994); Collins v. Day, 644 N.E.2d 72 (Ind. 1994); Indiana Dep't of Env'l. Mgt. v. Chemical Waste Mgt., Inc., 643 N.E.2d 331 (Ind. 1994); Moran v. State, 644 N.E.2d 536 (Ind. 1994).

BANKRUPTCY IN THE SEVENTH CIRCUIT: 1994

DOUGLASS G. BOSHKOFF*

This Survey covers a period of slightly less than twelve months: December 1, 1993 to October 31, 1994. As in previous years, it reviews only a few of the Seventh Circuit's bankruptcy decisions. It also assesses the impact of The Bankruptcy Reform Act of 1994 on existing Seventh Circuit authority.

I. CLAIMS AND ADMINISTRATIVE POWERS

*In re Udell*¹ is one of the most interesting cases to come before the Seventh Circuit in recent years. It examines the status of a covenant not to compete when the promisor is involved in bankruptcy proceedings. At both the trial and appellate levels, the written opinions address important issues of bankruptcy policy. The final disposition of this case is likely to attract attention from other circuits.

The facts in *In re Udell* are not unusual. Udell, while an employee at Carpetland, had signed a covenant not to compete. Later, he resigned and began doing business within the area covered by the covenant. Carpetland, seeking to enforce his promise, obtained a preliminary injunction from a state court. Udell then filed for bankruptcy under Chapter 13. This filing resulted in an automatic stay of the preliminary injunction, so Udell continued to operate his store. When Carpetland sought relief from the stay so that it could obtain a permanent injunction, Udell countered with a proposal to reject the covenant pursuant to section 365 of the Bankruptcy Code.² The bankruptcy court faced two primary issues: the enforceability of the promise not to compete following rejection, and the question of whether Carpetland had a claim in Udell's bankruptcy. Relief from the stay would not be appropriate if rejection vitiated the covenant or if Carpetland's right to equitable relief was a dischargeable claim.

More than twenty years ago, Professor Vern Countryman published an article on executory contracts in the *Minnesota Law Review*.³ Until recently, this article has set the terms of the debate concerning the status of such contracts when a promisor is adjudicated a bankrupt. Under a traditional analysis, to escape from the noncompete obligation, the promisor would be required to establish that the employment contract was still executory. If successful, the promisor could then argue that rejection invalidated the noncompete obligation.⁴ Recently, this traditional approach has come under attack.⁵ The trial court

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1. 18 F.3d 403 (7th Cir. 1994).
2. *In re Udell*, 149 B.R. 898, 901 (Bankr. N.D. Ind. 1992).
3. Vern Countryman, *Executory Contracts in Bankruptcy*, 57 MINN. L. REV. 439 (1973) and 479 (1974).
4. *In re Rovine*, 6 B.R. 661 (Bankr. W.D. Tenn. 1980).
5. See, e.g., Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. COLO. L. REV. 845 (1988); Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. COLO. L. REV. 1 (1991); Jay Lawrence Westbrook, *A Functional Analysis of Executory Contracts*, 74 MINN. L. REV. 227 (1989).

opinion by Judge Grant acknowledges the changes occurring in executory contract jurisprudence:

Carpetland first argues that the employment agreement between it and the debtor, which contains the covenant not to compete, is no longer "executory" and, therefore, cannot be rejected. Debtor argues that the agreement is still "executory" and all the obligations included within it are avoided upon rejection.

Recently, persuasive scholarly analysis of executory contracts and bankruptcy has argued that the search for "executoriness" as a precondition to rejection is misplaced. Professors Andrew and Westbrook both emphasize that rejection should be conceived as nothing more than the estate's business decision not to perform an obligation of the debtor, in the same fashion that a party to any contract always has the option either to perform or to breach an obligation and to accept the consequences of that decision. Thus, courts should not place the focus of rejecting executory contracts upon whether or not rejection is an available option but, instead, upon the consequences of rejection, as between creditor and the estate, and the effect of any discharge the debtor might ultimately obtain upon the rejected obligation.

One fundamental error identified by Professors Westbrook and Andrew is the notion that rejection in some way destroys the existence of the contract and allows the debtor to act as though it never existed. They emphasize that the rejection of an executory contract is not an avoiding power and does not operate to rescind or otherwise destroy the contract and the rights and obligations it contains. Instead, rejection constitutes nothing more than a pre-petition breach of the contract. . . .

This court, as have others before it, agrees with Westbrook and Andrew's approach to executory contracts. Accordingly, the court need not decide whether or not the contract between the debtor and Carpetland is "executory" or whether or not the debtor can reject it. Indeed, for the purposes of this decision, we assume that it is and that the debtor can do so. In either event, the resulting analysis is exactly the same. If the debtor cannot reject the contract, the issue before the court turns upon the effect of the debtor's potential Chapter 13 discharge upon the obligation represented by the covenant not to compete. In the same fashion, since rejection is not an avoiding power and does not operate to destroy, rescind, or nullify the rejected obligation, after rejection the question before the court becomes one of whether or not the debtor's potential Chapter 13 discharge will encompass the rejected restrictive covenant.⁶

6. *In re Udell*, 149 B.R. at 901-02 (Bankr. N.D. Ind. 1992) (citations omitted). See articles cited *supra* note 5. It is interesting to note that another Seventh Circuit executory contract/rejection decision during the Survey period relies upon the traditional analysis. In *Gouveia v. Tazbir*, 37 F.3d 295 (7th Cir. 1994), the debtor attempted to reject a recorded reciprocal, restrictive land covenant. This attempt was unsuccessful, in part because the court concluded that the covenant was not an executory contract. *Id.* at 298.

Judge Grant next considered whether Carpetland's right to an injunction was a "claim" under the Bankruptcy Code.⁷ Under 11 U.S.C. § 101(5)(B), a right to equitable relief is a "claim" if the breach of a contractual duty "gives rise to a right to payment." Finding that Indiana law did not give Carpetland a right to damages as an alternative to the equitable relief, Judge Grant concluded that Carpetland did not have a claim.⁸ Accordingly, the potential Chapter 13 discharge did not affect Carpetland's right to equitable relief. Judge Grant, therefore, granted the request for relief from stay because "the potential harm to Carpetland by continuing the stay outweighed the potential harm to the debtor which may flow from terminating it."⁹

District Court Judge William Lee agreed with Judge Grant's executory contract analysis. However, he reversed because he concluded that damages were available as compensation for the breach that was being enjoined.¹⁰

In the Seventh Circuit Court of Appeals, Udell and Carpetland offered differing constructions of the term "claim." Udell was admittedly liable in damages under Indiana law for any injury suffered prior to issuance of the preliminary state court injunction. He argued that this liability was sufficient to constitute a claim since the act of breach (competition), in addition to creating a right to equitable relief, created a right to payment for breach of performance.¹¹ Carpetland argued that a claim, as defined in the statute, existed only if the damage award were an alternative to the injunctive relief.¹² The court accepted this narrower reading of 11 U.S.C. § 101(5)(B). Since it also concluded that Indiana law did not provide an alternative damage remedy in this situation, it agreed with Judge Grant's conclusion that no claim existed.¹³

As Judge Flaum noted in his concurring opinion, reaching this conclusion depended on abandoning the plain meaning rule and reading the statute as if it required that such breach give rise to "an *alternative* right to payment."¹⁴ Nonetheless, he agreed that it was appropriate to take some interpretative liberties with the statutory language:

To appreciate the patent absurdity of implementing the plain text of [s]ection 101(5)(B) one must keep in mind that this is a bankruptcy statute. If, following the plain language, an injunction may be stayed in bankruptcy anytime the underlying breach of contract or law also happens to give rise to money damages, the real-world results would be ludicrous. If we were to apply the plain text of [section] 101(5)(B) to individuals restrained by court orders—e.g. trespassers, polluters, stalkers, batterers—theoretically, simply by filing bankruptcy, the violator could escape from any restraining order prompted by a

7. *In re Udell*, 149 B.R. at 903.

8. *Id.* at 906.

9. *Id.* at 907.

10. *Udell v. Standard Carpetland*, 149 B.R. 909 (N.D. Ind. 1993). The contract contained a liquidated damages clause that Judge Lee believed applied to both past and prospective breaches of the employment contract.

11. *In re Udell*, 18 F.3d 403, 406 (7th Cir. 1994).

12. *Id.*

13. *Id.* at 407.

14. *Id.* See *supra* text accompanying notes 7-8.

breach that also gave rise to an award of money damages. Certainly the parade of horribles is extensive, and I need not belabor it further. Since the text of [section] 101(5)(B) presents one of those extremely unique circumstances of patent absurdity, we may turn to the purpose, context and policy of [section] 101(5)(B) to supplement its plain language.¹⁵

I do not agree that a discharge affecting the legal liability of "trespassers, polluters, stalkers, batterers" is "ludicrous." Bankruptcy involves discharge, and the facts in *In re Udell* present important questions of discharge policy that merited debate.¹⁶ Unfortunately, only Judge Flaum's concurring opinion even recognizes the substantial impact of the decision on the rehabilitative relief available in bankruptcy.

Having concluded that Carpetland's claim was not discharged, the Seventh Circuit, nonetheless, remanded the case to the bankruptcy court:

It does not necessarily follow that Carpetland is entitled to relief from the stay, however. The automatic stay prescribed by the Bankruptcy Code applies to "judgment[s] obtained before the commencement of the case under this title," whether or not the judgment arises out of a "claim." Though the bankruptcy court correctly held that Carpetland's right to an injunction is not a claim, the court was required to also consider (1) the prejudice to the debtor or the bankruptcy estate from allowing the non-bankruptcy litigation to continue; (2) the relative hardship to the debtor and to the party seeking relief; and (3) the creditor's probability of prevailing on the merits in the litigation, before it could lift the automatic stay. Udell argued before the district court that the bankruptcy court abused its discretion by not giving sufficient consideration to his inability to get a "fresh start," or to the unequal treatment of other creditors which will result from the lifting of the stay. The district court reversed the bankruptcy court on other grounds without considering this remaining issue. Because we reverse the district court's decision, we remand this case to the district court for a determination of whether the bankruptcy court abused its discretion by granting Carpetland relief from the automatic stay.¹⁷

This disposition makes absolutely no sense. Rehabilitation through bankruptcy is achieved through a discharge. However, the bankruptcy discharge only bars the enforcement of "claims."¹⁸ Non-claims, as well as non-dischargeable claims, are not affected by the rehabilitation process. Since it believed that no claim existed, the Seventh Circuit should have affirmed the action of the trial court in granting relief from stay.

15. *Id.* at 412 (Flaum, J., concurring).

16. Under the court's reading of Indiana case law, Udell's obligation to refrain from future competition can never be discharged.

17. *In re Udell*, 18 F.3d at 410 (citing 11 U.S.C. § 362(a)(2) (1988) & *In re Fernstrom Storage & Van Co.*, 938 F.2d 731, 735 (7th Cir. 1991)).

18. A discharge prevents the collection of any (discharged) debts. 11 U.S.C. § 524(a)(2) (1988 & Supp. 1994). A debt is a liability on a claim. 11 U.S.C. § 101(12) (Supp. 1994). If the debt arising from the breach is discharged, the covenant not to compete should not be enforceable because it interferes with the debtor's fresh start. 2 DOUGLAS G. BAIRD, THE ELEMENTS OF BANKRUPTCY 122-27 (1993).

There is a further, more fundamental, flaw in this opinion. The court's premise that Indiana law does not create an alternative right to payment is incorrect.¹⁹ Under generally accepted principles of contract law, Udell's breach created a right to damages for losses arising prior to issuance of the preliminary injunction, and a right to either a permanent injunction or damages for the losses that would be sustained if Carpetland did not pursue the equitable remedy. In other words, Carpetland had a retrospective damage claim and, if it chose not to insist on injunctive relief, it also had a claim for prospective damages. The latter was truly alternative to its equitable rights.

In the absence of any controlling Indiana authority, the court of appeals relied on the well-recognized rule stated in *The Restatement (Second) of Contracts*:²⁰ "Specific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty."²¹ This section of the *Restatement*, however, does not support the proposition that damages are not an alternative to equitable relief. Rather, the rule it states prevents the party in breach from defeating the innocent party's request for equitable relief by asserting that the liquidated damages clause provides an adequate legal remedy. Notwithstanding that provision, Carpetland had the option of foregoing equitable relief and claiming damages if the competition continued. As the *Restatement (Second) of Contracts* states: "Every breach of contract gives the injured party a right to damages against the party in breach Although a judgment awarding a sum of money as damages is the most common judicial remedy for breach of contract, other remedies, including equitable relief in the form of specific performance or an injunction, may be also available."²² Carpetland had an alternative damage remedy, and its right to equitable relief was a claim. The court's opinion ignores this distinction between the retrospective (cumulative) damage claim and the prospective (alternative) damage claim. Ultimately, of course, it does not matter which construction of the statute prevails. Under either reading, Udell has a claim.²³

19. None of the authorities cited in the majority opinion support the proposition that Carpetland does not have an alternative right to damages if it chooses to forego injunctive relief. *Duckwall v. Rees*, 86 N.E.2d 460 (Ind. App. 1949) decided that the language in a contract for the sale of real estate clearly indicated that only damages, not equitable relief, was the appropriate remedy following breach by the vendor. *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208 (Ind. Ct. App. 1982) merely holds that an innocent party is entitled to both retrospective damages and an injunction to prevent future harm. The Seventh Circuit's citation of this case for the proposition that "an injunction and an award of liquidated damages are cumulative and not alternative," *In re Udell*, 18 F.3d at 409, demonstrates that the court is not aware of the fact that an innocent party who chooses to pursue a damage claim alone is also entitled to the alternative remedy of damages to compensate for future harms. *Hahn v. Drees, Perugini & Co.*, 581 N.E.2d 457 (Ind. Ct. App. 1991) reaches the same conclusion as *Seach*. *Rajski v. Tezich*, 514 N.E.2d 347 (Ind. Ct. App. 1987) merely affirms an award of equitable relief while reversing enforcement of an invalid liquidated damages clause.

20. *In re Udell*, 18 F.3d at 409; see RESTATEMENT (SECOND) OF CONTRACTS § 361 (1981).

21. RESTATEMENT (SECOND) OF CONTRACTS § 361.

22. *Id.* at § 346 cmt. a.

23. The court's mistake concerning Carpetland's rights under Indiana law clearly affected the outcome of the appeal. As it noted in a footnote, if the parties had intended that a liquidated damages provision "replace the right to specific performance Carpetland's right to an injunction would undoubtedly be a 'claim.'" *In re Udell*, 18 F.3d at 409 n.4.

Unless other courts recognize this error, *Udell* may unduly restrict the availability of rehabilitation through bankruptcy.

II. DISCHARGE

*Hiatt v. Indiana State Student Assistance Commission*²⁴ is another decision likely to attract attention outside the Seventh Circuit. It is the first court of appeals decision determining when the nondischargeability period for educational loans begins following a consolidation agreement with a new lender. The news for student borrowers is not good; the nondischargeability clock is reset. This is done even when no new credit (above the amount required for consolidation) is involved.

Although the court invokes the plain meaning rule to justify the result,²⁵ the language in 11 U.S.C. § 523(a)(8) is far from clear. The statute restricts discharge of educational debt within a stated period of time from when “such loan first became due.”²⁶ The term “such loan” can be taken as a reference to either the original loan or the consolidation loan.

As a matter of policy, this result is probably inevitable given the current structure of the student loan program. Unless the clock is restarted when the consolidation loan is made, it will become increasingly difficult, and eventually impossible, for student borrowers to refinance their education loans. Thus, student borrowers who consolidate their obligations waive some of the protection provided by a bankruptcy discharge. The result is similar to the consequence of an unwise reaffirmation, although the consequences of a bad decision in this context last for only seven years.

This is the second consecutive year in which the Seventh Circuit has issued an important educational loan opinion. Last year, the court adopted a narrow interpretation of the “undue hardship” requirement for immediate dischargeability.²⁷ At that time, I observed that the court was requiring “[s]omething akin to abject and permanent misery.”²⁸ While the issue this year is different, the misery continues.

III. CHAPTER 12/13 PROCEEDINGS

Three interesting decisions involving rehabilitation proceedings for debtors with regular income were handed down during the Survey period. In *In re Fortney*,²⁹ the debtor proposed a three-year Chapter 12 plan. This plan amortized a real estate mortgage over a twenty-year period. It also proposed to pay a secured tax claim in the three years covered by the plan. The trustee argued that the tax claim should also be paid over a period greater than three years.³⁰ Accepting the trustee’s argument would have increased

24. 36 F.3d 21 (7th Cir. 1994).

25. *Id.* at 23.

26. *Id.* (citing 11 U.S.C. § 523(a)(8) (1988 & Supp. 1994)). During the initial repayment period, discharge is available only upon a showing of “undue hardship.” 11 U.S.C. § 523(a)(8).

27. *In re Roberson*, 999 F.2d 1132 (7th Cir. 1993).

28. Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1993*, 27 IND. L. REV. 761, 765 (1994).

29. 36 F.3d 701 (7th Cir. 1994).

30. *Id.* at 705.

the disposable income which § 1225(b) requires be distributed to unsecured claims during the term of the plan. The lower court's rejection of this argument was affirmed.³¹

The decision in *In re Fortney* is very sensible. The trustee was, in effect, claiming that the disposable income requirement was not satisfied. In the simplest circumstances, it is often difficult to decide whether this requirement has been met. It is best to confront this issue directly by asking whether projected income is adequate and living expenses are excessive.

A second decision, *In re Witkowski*,³² sends a very strong signal that "pot" plans will be preferred to "defined percentage" plans. In a pot or "base" plan,³³ the debtor proposes to pay a set amount to creditors. The actual percentage payout on unsecured claims is determined by the number of claims filed. In a percentage plan, creditors receive the same payout percentage regardless of the amount of claims that are filed. If less than the anticipated amount of claims are filed, a windfall to the debtor is possible. This is what happened in *In re Witkowski*. The debtor proposed to pay ten percent to creditors over a forty-seven-month term.³⁴ When all his creditors failed to file proofs of claim, the Chapter 13 trustee moved to deprive the debtor of any benefit by modifying the plan pursuant to 11 U.S.C. § 1329(a).³⁵ The proposed modification increased the payout to participating creditors to nineteen percent, over the same forty-seven-month term.³⁶ Debtor argued that the trustee's request should be denied because both § 1329³⁷ and the common law doctrine of res judicata require a showing of changed circumstances as a condition of modification.³⁸ Neither argument was successful.

Although *In re Witkowski* does not hold that percentage plans can never be confirmed, a highly critical footnote questions the legality of such plans:

A percentage plan, by its very nature, does not seem to constitute a plan by which the debtor will contribute all disposable income to the plan because the debtor may retain a portion of disposable income if fewer than anticipated claims are filed. Rather, to fulfill the disposable income requirement, it would seem that any surplus of funds must be funneled into the plan, not returned to the debtor.³⁹

31. *Id.* at 707.

32. 16 F.3d 739 (7th Cir. 1994).

33. For a description of various types of plans, see 2 KEITH LUNDIN, CHAPTER 13 BANKRUPTCY § 4.84 (1994).

34. *In re Witkowski*, 16 F.3d at 741.

35. *Id.*

36. *Id.*

37. There is nothing in § 1329 that prohibits modification. However, there is an argument against modification based on language in 11 U.S.C. § 1327(a) (1988) providing that "[t]he provisions of a confirmed plan bind the debtor and each creditor." The plan in *In re Witkowski* had been confirmed. The Seventh Circuit has twice been unwilling to allow challenges to the provisions of a confirmed plan when a subsequent objection comes from a secured claim holder. See *In re Chappell*, 984 F.2d 775 (7th Cir. 1993); *In re Pence*, 905 F.2d 1107 (7th Cir. 1990).

38. *In re Witkowski*, 16 F.3d at 741.

39. *Id.*

*In re Escobedo*⁴⁰ is the final interesting rehabilitation decision. It concerns a confirmed Chapter 13 plan which proposed to pay a certain amount to creditors during the life of the plan. The stipulated sum was insufficient to satisfy the requirement of 11 U.S.C. § 1322(a)(2) that priority claims be paid in full. Indeed, the plan did not even state any treatment for priority claims other than administrative expenses. However, these defects were not noticed prior to confirmation, which occurred without objection from any creditor. The shortfall was apparently discovered when amended proofs of priority tax claims were filed. These claims were allowed, but the debtor never modified her plan. Then, almost five years after confirmation and two years after the last plan payment, the trustee moved to dismiss pursuant to 11 U.S.C. § 1307. The bankruptcy court granted this motion.⁴¹ The Seventh Circuit affirmed, rejecting the debtor's argument that the language of 11 U.S.C. § 1327(a) ("the provisions of a confirmed plan bind . . . each creditor") and the doctrine of res judicata preclude a post-confirmation challenge to the treatment of priority tax claims.⁴²

This case exposes a weakness in the Chapter 13 process. Rapid confirmation is desirable so that payments to creditors can commence at an early date.⁴³ However, confirmation before completion of the claim allowance process creates the possibility for conflict between the plan provision and the allowed claim. "Problems arise because the Bankruptcy Code describes two parallel processes that inevitably interact and overlap at confirmation in a Chapter 13 case."⁴⁴

Twice in recent years, the Seventh Circuit has applied the principle of res judicata to resolve the conflict between the confirmation process and the claims allowance process. In both *In re Pence*⁴⁵ and *In re Chappell*,⁴⁶ the court refused to allow post-confirmation challenges to the plan treatment of a secured claim. The opinion in *In re Escobedo*⁴⁷ reaches a different conclusion without citing *In re Pence*. *In re Chappell* is distinguished on the ground that it "involved the non-mandatory code provisions (the 'permissive' plan provisions of § 1322(b)) rather than the mandatory plan provisions of § 1322(a)(2)."⁴⁸

This distinction between mandatory and permissive confirmation requirements is illusory. All of the plan requirements in 11 U.S.C. § 1322 are mandatory in the sense that compliance is a requirement for confirmation if the plan addresses a situation to which the requirement is applicable. None can be ignored. But only the requirements of § 1322(a)

40. *In re Escobedo*, 28 F.3d 34 (7th Cir. 1994).

41. *Id.*

42. *Id.* at 35. The debtor relied primarily on *In re Szostek*, 886 F.2d 1405 (3rd Cir. 1989), a leading authority for the proposition that the bankruptcy court has discretion to confirm a plan that does not meet all confirmation requirements. The Ninth Circuit has recently refused to follow *In re Szostek*. See *In re Barnes*, 32 F.3d 405 (9th Cir. 1994).

43. Funds turned over to the trustee cannot be disbursed until the plan is confirmed. 11 U.S.C. § 1326(a)(2) (1988).

44. LUNDIN, *supra* note 33, at § 6.10.

45. 905 F.2d 1107 (7th Cir. 1990).

46. 984 F.2d 775 (7th Cir. 1993).

47. 28 F.3d 34.

48. *Id.* at 34 n.1.

will be applicable to every plan. Those in § 1322(b) may or may not apply to a specific plan depending upon the needs of the debtor.

Prior to this decision, the Seventh Circuit had been a leader among the minority of courts willing to give preclusive effect to a confirmed Chapter 13 plan.⁴⁹ *In re Escobedo* is inconsistent with prior authority. Its sanction of dismissal pursuant to 11 U.S.C. § 1307 is likely to lead to more litigation.⁵⁰

IV. CHAPTER 11 PROCEEDINGS

Section 1122(a) of title 11 of the United States Code permits claims to be placed in the same class by a reorganizing debtor only if they are "substantially similar" to other claims in the same class.⁵¹ The statute, however, does not provide clear guidance as to when similar claims may be placed in different classes. A debtor may want to split similar claims into separate classes in order to satisfy the requirement of 11 U.S.C. § 1129(a)(10) that at least one impaired class accept the plan.⁵² If the debtor enjoyed unlimited power to create classes of claims, the requirement of one accepting class could too easily be satisfied.

One leading decision, *In re Greystone III Joint Venture*,⁵³ would allow separate classification as long as it is not done for the purpose of obtaining the approval of an impaired class.⁵⁴ However, the *In re Greystone* court refused to approve separate classification for a deficiency claim created by § 1111(b).⁵⁵ It believed the separate classification was an attempt to secure approval of the Chapter 11 plan by gerrymandering classes.⁵⁶

*In re Woodbrook Associates*⁵⁷ takes a different view of this classification problem. Observing that "we cannot accept the proposition implicit in *Greystone* that separate classification of a § 1111(b) claim is nearly conclusive evidence of a debtor's intent to gerrymander,"⁵⁸ the court found such "significant disparities" between the § 1111(b) claim and general unsecured claims that separate classification was required.⁵⁹ *In re Woodbrook*

49. LUNDIN, *supra* note 33, at § 6.13.

50. Here is a possible scenario. Debtor, barred from obtaining a Chapter 7 discharge, files under Chapter 13. The plan eventually fails after Debtor has made substantial payments to Creditors. Debtor applies for a § 1328(b) discharge. Creditor counters with a Motion to Dismiss under § 1307 arguing that the plan should never have been confirmed because the requirement of § 1322(a)(1) was (in retrospect) not satisfied. If *Escobedo* is followed, the Motion to Dismiss may be granted.

51. 11 U.S.C. § 1122(a) (1988).

52. 11 U.S.C. § 1129(a)(10) (1988).

53. 995 F.2d 1274 (5th Cir. 1991).

54. *Id.* at 1279.

55. *Id.*

56. *Id.*

57. 19 F.3d 312 (7th Cir. 1994).

58. *Id.* at 318.

59. *Id.* at 319-20. The court also refused to decide whether the "new value precept" survived adoption of the new bankruptcy code. *Id.*

thus makes it somewhat easier to secure confirmation of a single asset bankruptcy in this circuit.⁶⁰

V. PROCEDURE

*Zerand-Bernal Group, Inc. v. Cox*⁶¹ is the final noteworthy decision. In *Zerand*, the bankruptcy court had approved a sale of the debtor's assets free and clear of all claims. The bankruptcy court reserved jurisdiction to enforce the agreement, as proposed in the reorganization plan. Several years later, Cox commenced a products liability suit against the purchaser of the debtor's assets for injuries caused by a machine sold to him by the debtor prior to the bankruptcy sale. The defendant in this action then applied to the bankruptcy court for an injunction preventing Cox from proceeding with the products liability litigation. The bankruptcy court decided that it lacked jurisdiction to enjoin Cox's action. The Court of Appeals affirmed the dismissal.⁶²

Judge Posner's opinion rejects arguments that bankruptcy jurisdiction exists either because the equitable action is related to the bankruptcy proceeding or arises under the bankruptcy statute.⁶³

As for the argument that the existence of federal jurisdiction would encourage purchasers to participate at bankruptcy sales, Judge Posner was unimpressed:

We said that the federal interest is tenuous, not that it is nonexistent. *Zerand* points out that the price received in a bankruptcy sale will be lower if a court is free to disregard a condition in the sale agreement enjoining claims against the purchaser based on the [seller's] misconduct. If the condition is invalid the purchaser will be buying a pig in a poke, never knowing when its seller's customers may come out of the woodwork and bring suit against it under some theory of successor liability. This possibility will depress the price of the bankrupt's assets, to the prejudice of creditors. All this is true, but proves too much. It implies, what no one believes, that by virtue of the arising-under jurisdiction a bankruptcy court enjoys a blanket power to enjoin all future lawsuits against a buyer at a bankruptcy sale in order to maximize the sale price: more, that the court could in effect immunize such buyers from all state and federal laws that might reduce the value of the assets bought from the bankrupt; in effect, that it could discharge the debts of nondebtors (like *Zerand*) as well as of debtors even if the creditors did not consent; that it could allow the parties to bankruptcy sales to extinguish the rights of third parties, here future tort claimants, without notice to them or (as notice might well be infeasible) any consideration of their interests. If the court could do all these nice things the result would indeed be to make the property of bankrupts more valuable than other property—more valuable to the creditors, of course, but also to the debtor's shareholders and managers to the extent that the strategic position of the debtor

60. See generally Bruce A. Markell, *Clueless on Classification: Toward Removing Artificial Limits on Chapter 11 Claim Classification*, 11 BANKR. DEV. J. 1 (1994).

61. 23 F.3d 159 (7th Cir. 1994).

62. *Id.* at 164.

63. *Id.* at 162-63.

in possession in a reorganization enables the debtor's owners and managers to benefit from bankruptcy. But the result would not only be harm to third parties, such as the Coxes, but also a further incentive to enter bankruptcy for reasons that have nothing to do with the purposes of bankruptcy law.⁶⁴

As this quotation indicates, it is difficult to discuss the jurisdictional issue without discussing the merits of issuing an injunction. In any event, the consequence of the decision is clear. It lessens the finality ordinarily associated with bankruptcy sales.⁶⁵

VI. THE BANKRUPTCY REFORM ACT OF 1994

The Bankruptcy Reform Act of 1994⁶⁶ was signed into law by President Clinton on October 22, 1994. This statute reverses the effect of several Seventh Circuit decisions. Bankruptcy judges may now hold jury trials under certain circumstances;⁶⁷ and, liens protecting marital obligations can no longer be avoided under 11 U.S.C. § 522(f)(1).⁶⁸ The two most dramatic changes involve the decisions in *Levit v. Ingersoll Rand Financial Corp.*⁶⁹ and *In re Lybrook*.⁷⁰

In *Levit*, the trustee was allowed to recover a preferential transfer occurring more than ninety days before bankruptcy from a non-insider creditor when the transfer benefitted an insider. Although two other courts of appeal reached the same conclusion,⁷¹ this line of decisions provoked a storm of protest from the commercial lending community. H.R. 5116 only permits recovery from the insider in this situation.⁷²

In re Lybrook,⁷³ discussed in this Survey two years⁷⁴ ago, decided that an inherited asset must be included in the bankruptcy estate upon conversion from Chapter 13 to Chapter 7 even though the assets were inherited more than 180 days after the petition was filed. The Seventh Circuit was clearly concerned about the possibility of opportunistic inter-chapter movement. When *In re Lybrook* was decided, I suggested that it might be

64. *Id.* at 163 (citing *In re American Hardwoods, Inc.*, 885 F.2d 621, 624 (9th Cir. 1989)).

65. One commentator has called *Zerand* "a dramatic decision with far ranging impact." Martin Klein, *Bankruptcy Sales, Caveat Emptor*, N.Y.L.J., Sept. 8, 1994, § 1, at 5.

66. Pub L. No. 103-394, 108 Stat. 4106 [hereinafter H.R. 5116].

67. Section 112 of H.R. 5116 overrules *In re Grabill Corp.*, 967 F.2d 1152 (7th Cir. 1992).

68. *In re Sanderfoot*, 899 F.2d 598 (7th Cir. 1990). This decision, criticized in Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1989-1990*, 24 IND. L. REV. 551 (1991), was reversed by the Supreme Court in *Farrey v. Sanderfoot*, 500 U.S. 291 (1991). After *Farrey*, there were still some situations in which § 522(f)(1) could be used to avoid a judicial lien protecting marital obligations. This avoidance is no longer possible. Section 304 of H.R. 5116 prohibits use of § 522(f) when alimony, maintenance and support obligations are involved.

69. 874 F.2d 1186 (7th Cir. 1989).

70. 951 F.2d 136 (7th Cir. 1991).

71. *In re C-L Cartage Co.*, 899 F.2d 1490 (6th Cir. 1990); *In re Robinson Bros. Drilling*, 892 F.2d 850 (10th Cir. 1989).

72. H.R. 5116 § 202.

73. 951 F.2d 136 (7th Cir. 1991).

74. Douglass G. Boshkoff, *Bankruptcy in the Seventh Circuit: 1992*, 26 IND. L. REV. 749, 757-58 (1993).

better to deal directly with opportunistic conversion rather than always including the asset in the converted estate.⁷⁵ The new legislation uses this approach. Ordinarily, property inherited more than 180 days after the Chapter 13 petition will not be part of the estate. However, if the conversion is in bad faith, all post-petition, pre-conversion property is included in the post-conversion bankruptcy estate.⁷⁶

75. I suggested that dismissal was the appropriate response to a bad faith conversion request. Then all post-petition property would be part of the subsequent (if any) proceeding.

76. H.R. 5116 § 311.

1994 DEVELOPMENTS IN COMMERCIAL LAW AND CONSUMER PROTECTION LAW

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INTRODUCTION

This Article surveys significant developments in Indiana contract law, commercial law and consumer protection law from November 1, 1993 through October 31, 1994. The opinions reviewed include both Indiana decisions and federal court decisions construing Indiana law.

In comparison with 1993, when the Indiana Supreme Court made significant new law in the areas of punitive damages with the decision in *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*¹ and application of Article 2 of the Uniform Commercial Code with the decision in *Insul-Mark Midwest, Inc. v. Modern Materials, Inc.*,² the 1994 Survey year was rather uneventful. However, there were some interesting and informative decisions in the areas of secured transactions and consumer protection.

I. SECURED TRANSACTIONS

In *Star Bank v. Laker*,³ Laker obtained a loan from Star Bank and pledged certain farming implements as collateral, including two tractors, a corn picker and a disc.⁴ When Laker defaulted on his loan, Star Bank repossessed the equipment.⁵ In doing so, Star Bank's agents caused ruts in Laker's property, negligently injured one of Laker's horses, and damaged the disc.⁶

In support of his claim for damages, Laker offered evidence of the amount it cost to repair or replace his damaged property. However, no evidence was offered of the value of Laker's property before and after the damage caused by the bank. The jury found in favor of Laker and returned a verdict of \$225 in compensatory damages and \$7000 in punitive damages.⁷

The court of appeals held that the proper measure of damages is the difference in fair market value of the repossessed equipment immediately before the repossession and immediately after the damage allegedly occurred.⁸ Because Laker failed to establish the amount of damages by showing fair market value of his property before and after the repossession, the court of appeals reversed the award of actual damages.⁹ The Indiana Supreme Court granted transfer and reinstated judgment for Laker.

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1. 608 N.E.2d 975 (Ind. 1993).

2. 612 N.E.2d 550 (Ind. 1993).

3. 637 N.E.2d 805 (Ind. 1994).

4. *Id.* at 806.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 807.

9. *Id.* See *Star Bank, N.A. v. Laker*, 626 N.E.2d 466, 471-72 (Ind. Ct. App. 1993).

The supreme court stated that it was "abundantly clear from the evidence that in each instance, Laker in fact did suffer damage at the hands of the agents of the Bank. However, in each instance the jury was left to guess at what the actual damage was."¹⁰ This ambiguity, however, does not require that the jury verdict be reversed. Because it was clear that Laker had incurred some damage, the jury appropriately awarded Laker damages of \$225. Accordingly, the supreme court construed the \$225 award as nominal damages. "[B]eing uninformed as to the actual amount of damages, [the jury] chose to award Laker a nominal sum of \$225 for the actual damage he suffered. Having done so, it was entirely proper for the jury to then consider punitive damages."¹¹

The "Court has stated on several occasions that an award of nominal damages may support an award of punitive damages."¹² The supreme court found sufficient evidence that the Bank's agents had acted "in an unreasonable and unnecessarily damaging manner in removing the machinery from Laker's property."¹³ Most importantly, the Bank refused to release the machinery unless Laker would hold the Bank harmless for the damages caused to Laker's property. "This action alone by the Bank is full justification for the jury's award of punitive damages."¹⁴ Therefore, the court reinstated the judgment of the trial court awarding \$225 in compensatory damages and \$7000 in punitive damages.¹⁵

Star Bank reminds practitioners that failure to return repossessed collateral upon receiving payment can result in exposure to punitive damages. Furthermore, punitive damages may be available, regardless of whether an amount of actual damages has been adequately proved, if at least nominal damages are awarded.

II. UNIFORM COMMERCIAL CODE—SECURED TRANSACTIONS

Late in 1993, the Indiana Court of Appeals for the First District published a primer on secured transactions in *Gibson County Farm Bureau Cooperative Ass'n v. Greer*.¹⁶ In that case, the court confronted the previously unaddressed issue of whether a properly filed financing statement alone contains the requisite elements of an enforceable security agreement permitting it to be both proof of attachment and a sufficient perfection. Late in 1994, the Indiana Supreme Court affirmed the trial court and vacated the opinion of the court of appeals.¹⁷

In *Gibson County Farm Bureau*, a farmer, Norman Greer ("Greer"), financed his corn and soybean crops through Miles, Inc. ("Miles").¹⁸ Greer executed a standard financing statement form¹⁹ that identified himself as the debtor, Miles as the secured party, and all

10. *Id.*

11. *Id.*

12. *Id.* (citing *Hibschnan Pontiac, Inc. v. Batchelor*, 362 N.E.2d 845 (Ind. 1977); *Arlington State Bank v. Colvin*, 545 N.E.2d 572 (Ind. Ct. App. 1989)).

13. *Id.*

14. *Id.*

15. *Id.*

16. 622 N.E.2d 551 (Ind. Ct. App. 1993).

17. *Gibson County Farm Bureau Coop. Ass'n v. Greer*, 643 N.E.2d 313 (Ind. 1994).

18. *Id.* at 314.

19. IND. CODE § 26-1-9-402 (1993) prescribes a standard financing statement commonly known as a

corn and soybeans presently growing or to be planted on certain lands specified by legal description in an exhibit to the financing statement as the collateral.²⁰ Miles then filed the financing statement in the office of the county recorder. No other documents were executed by Greer in connection with his debt to Miles. After harvesting, Greer sold some of his corn and soybean crops to a company in exchange for a check made jointly payable to Greer, Miles and the Gibson County Farm Bureau ("Farm Bureau"). Greer endorsed the check and gave it to Miles, which then sought an endorsement from Farm Bureau. Farm Bureau refused, however, disputing Miles's priority to the proceeds from the check.²¹

Several months later, Farm Bureau obtained a judgment against Greer and filed a lis pendens notice pursuant to Indiana Trial Rule 63.1(C)²² on all of Greer's crops and proceeds to perfect its security interest.²³ Thereafter, Farm Bureau filed a verified motion for proceedings supplemental seeking to collect against the outstanding check payable to Greer, Miles and Farm Bureau.²⁴ Later that year, Farm Bureau filed a verified motion for proceedings supplemental naming Miles as an additional garnishee defendant, thereby perfecting its lien when Miles was served with a summons.²⁵ In the subsequent proceedings to determine priority of claimants, Miles asserted that it also had a claim against Greer in excess of the amount of the check.²⁶

After the parties stipulated to the facts, the trial court entered judgment finding that "while there was not a document specifically designated a security agreement, that nevertheless, the notice requirements of Indiana Code [section] 26-1-9-203 were met by the filing of the UCC-1 Financing Statement."²⁷ Thus, the trial court held that Miles had a perfected security interest in the check proceeds superior to Farm Bureau's interest as a judgment lien creditor.²⁸

On appeal, Farm Bureau argued that the trial court erroneously held that the UCC-1 financing statement executed by Greer and Miles doubled as both a security agreement and a financing statement between them. Instead, Farm Bureau asserted that Greer and Miles never executed a security agreement, and therefore, there was no security interest to which the perfected financing statement could attach.²⁹

UCC-1.

20. *Gibson*, 643 N.E.2d at 315.

21. *Id.*

22. Pursuant to IND. TRIAL RULE 63.1(C), a lis pendens notice perfects an interest in personal property that previously attached via judicial proceedings.

23. *Gibson County Farm Bureau Coop. Ass'n v. Greer*, 622 N.E.2d 551, 553 (Ind. Ct. App. 1993).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* IND. CODE § 26-1-9-203 (1993) specifies the requirements for creating a security interest that is enforceable against the debtor, or, in other words, for the security interest to "attach." To be enforceable against third parties, the security interest must not only have attached, but must also be perfected by properly filing a financing statement.

28. *Gibson*, 622 N.E.2d at 553.

29. *Id.* at 554.

A. The Financing Statement

Indiana Code section 26-1-9-402 specifies the formal requisites of a financing statement.³⁰ Because the UCC-1 filed by Miles with the accompanying exhibit contained the names and addresses of both Greer and Miles, described the collateral crops and the real estate on which they were grown, and was signed by Greer, it satisfied the requirements for filing a financing statement.³¹

B. Perfection

Perfection occurs when a financing statement is filed in the proper place. Indiana Code section 26-1-9-401 specifies where such statements should be filed.³² The financing statement filed by Miles was properly filed in the county recorder's office in the county in which the farmed real estate was located.³³ Thus, Miles met the requirements for perfection.

C. The Security Agreement

"Before a security interest is effective against third parties, it must have attached and be perfected."³⁴ "[P]erfection in the absence of a possessory security interest or a written security agreement accomplishes nothing, and the security interest is not enforceable against the debtor or third parties."³⁵ Indeed, the existence of a filed financing statement does not mean that an enforceable security interest exists.³⁶ Putting third parties on notice that a security interest exists, even with the written permission of the indebted party, does not create a security interest unless all the requirements for the creation of a security interest are satisfied. "No security interest attaches to collateral until the debtor signs a security agreement containing a description of the collateral, the debtor grants a security interest, value is given, and the debtor has rights in the collateral."³⁷

30. IND. CODE § 26-1-9-402 (1993), provides, in relevant part, as follows:

A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor, and contains a statement indicating the types, or describing the items, of collateral. . . . When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned.

31. *Gibson*, 622 N.E.2d at 555.

32. IND. CODE § 26-1-9-401(1) (1993).

33. *Gibson*, 622 N.E.2d at 555.

34. *Id.* (citing IND. CODE § 26-1-9-303 (1993)).

35. *Id.* (citing IND. CODE § 26-1-9-203(1) (1993); *In re R. & L. Cartage & Sons, Inc.*, 118 B.R. 646, 649 (Bankr. N.D. Ind. 1990); *In re Hillman*, 94 B.R. 18, 21 (Bankr. D. Conn. 1988)).

36. This is not to say that a security agreement cannot also be a financing statement. To the contrary, IND. CODE § 26-1-9-402(1) (1993) specifically allows that "[a] copy of the security agreement is sufficient as a financing statement if it contains the [requisite] information and is signed by the debtor."

37. *Gibson*, 622 N.E.2d at 555 (citing IND. CODE § 26-1-9-203(1) (1993)); *Thrift, Inc. v. A.D.E., Inc.*, 454 N.E.2d 878, 881 (Ind. Ct. App. 1983); *Cargill, Inc. v. Perlich*, 418 N.E.2d 274, 278 (Ind. Ct. App. 1981)).

Although “a separate formal document labeled a security agreement is not necessary,” and “there are no magic words required in a security agreement, there must be language in the instrument which leads to the logical conclusion that the debtor intended to create a security interest.”³⁸ In the instant case, the court of appeals concluded that the UCC-1 financing statement filed by Miles did not contain language that could be construed as “actually conveying a security interest” in Greer’s crops.³⁹ Thus, the appellate court concluded that the financing statement could not also be construed as a security agreement and it was error to find Miles’s interest in Greer’s crops superior to Farm Bureau’s.

The supreme court granted transfer because “[a]lthough many jurisdictions have had to address the question [of] whether a financing statement may also serve as a security agreement, this is a question of first impression in the Indiana state courts.”⁴⁰ However, the supreme court reversed the appellate court, and explained that the court of appeals applied the disfavored “*American Card* rule.”⁴¹ Grant Gilmore, one of the drafters of Article 9, has written:

Certainly nothing in [section] 9-203 requires that the “security agreement” contain a “granting” clause. The [section] 9-402 financing statement contained all that was necessary to satisfy the [section] 9-203 statute of frauds as well as being sufficient evidence of the parties’ intention to create a security interest in the tools and dies. No doubt the court would have upheld the security interest if the debtor had signed two pieces of paper instead of one. The [section] 9-402 provision that a short financing statement may be filed in place of the full security agreement was designed to simplify the operation. The Rhode Island court gives it an effect reminiscent of the worst formal requisites holding under the nineteenth century chattel mortgage acts.⁴²

After reviewing the approaches commonly used in other jurisdictions, the court concluded that the best approach reflects the policies underlying the *Uniform Commercial Code*.⁴³

First, [section] 1-201(3) provides that “‘Agreement’ means the bargain of the parties as *in fact* found in their language *or by implication from other circumstances including course of dealing or usage of trade or course of performance . . .*.” Second, where the Writing Requirement of [section] 9-203(1)(a) has been satisfied—where there is a writing signed by the debtor identifying the collateral and the land involved when the collateral is crops—the definitions provided by the Code make it plainly apparent that the parties may

38. *Id.* at 556 (citing *In re Krause*, 114 B.R. 582 (Bankr. N.D. Ind. 1988); *Shelton v. Erwin*, 472 F.2d 1118, 1120 (8th Cir. 1973)).

39. *Id.*

40. *Id.*

41. The first case to consider this question was *American Card Co. v. H.M.H. Co.*, 196 A.2d 150 (R.I. 1963).

42. 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 11.4, at 342-48 (1965).

43. *Gibson*, 643 N.E.2d at 320.

have intended the writing to be a security agreement. For example, [section] 9-105(1)(c) provides that “‘Collateral’ means the property subject to a security interest. . . .” Thus, when a party has signed a document identifying a certain property as “collateral,” that may be a fact showing an intent to create a security interest in the collateral.⁴⁴

The court was unwilling to hold that “a standard-form UCC-1 financing statement alone is, as a matter of law, sufficient evidence that the parties intended to create a security interest.”⁴⁵ However, in this case, the court held that “once the Writing Requirement of [section] 9-203(1) is satisfied, whether the parties intended the writing to create a security interest is a question of fact for the trier of fact to determine.”⁴⁶

In *Gibson County Farm Bureau*, the supreme court clarified existing law requiring that in cases where only a standard-form UCC-1 has been executed and filed, the finder of fact must determine whether the writing also created a security interest. Practitioners are cautioned not to assume that a UCC-1 will alone be sufficient to create and perfect a security interest. The better practice continues to be to use both a written security interest and a UCC-1 form.

III. CONSUMER PROTECTION—CREDIT REPORTING AND BANKS

In 1994, several cases on consumer protection law in the area of credit reporting and the Fair Credit Reporting Act (FCRA) were reported.⁴⁷ In *Nikou v. INB National Bank*, the court of appeals construed the FCRA, finding that the INB National Bank (INB) had qualified immunity and was therefore not liable for alleged damages caused to Nikou as a result of providing information to local credit reporting agencies.⁴⁸

Nikou, a general manager of an automobile dealership, agreed to assist one of his employees in consolidating his debts by obtaining an installment loan through INB. The loan was evidenced by a note that was signed by both the employee and Nikou as co-makers. The employee never made a single payment on the note, so INB sought payment from Nikou.⁴⁹ On a few occasions, Nikou allowed INB to debit his business account at INB to bring the account current.⁵⁰

In 1992, INB supplied local credit reporting agencies with information about Nikou’s payment history on the installment loan. Subsequently, Nikou’s credit report contained information that twenty payments had been made late on the account. As a result, Nikou was denied credit and was unable to refinance or obtain new loans.⁵¹ Nikou then requested that INB correct the credit reporting “error” but INB responded that its report was accurate.⁵²

44. *Id.* (emphasis supplied in the court opinion).

45. *Id.*

46. *Id.*

47. 15 U.S.C. §1681 (1988).

48. 638 N.E.2d 448, 454 (Ind. Ct. App. 1994).

49. *Id.* at 450.

50. *Id.* at 450-51.

51. *Id.* at 451.

52. *Id.*

In December 1992, Nikou filed suit against INB alleging, *inter alia*, that INB furnished incorrect information to local credit reporting agencies.⁵³ INB filed a motion for summary judgment which was subsequently granted and entered as a final judgment.⁵⁴

In the court of appeals' decision, Chief Judge Sharpnack provides an excellent introduction to the FCRA and its application to banks that use reports from, and provide information to, credit reporting agencies. For purposes of the instant case, two subchapters of the FCRA are of particular interest. First, 15 U.S.C. § 1681n provides that “[a]ny consumer reporting agency⁵⁵ or user of information which willfully fails to comply” with the FCRA is liable to a damaged consumer.⁵⁶ Second, 15 U.S.C. § 1681o provides that any consumer reporting agency or user of information that negligently fails to comply with the FCRA is liable to a damaged consumer.⁵⁷

INB was not a “consumer reporting agency” within the definition of the FCRA because the information it supplied to the credit reporting agency was not a “consumer report.”⁵⁸ “The term does not include . . . any report containing information solely as to transactions or experiences between the consumer and the person making the report.”⁵⁹ Furthermore, INB was not a “user of information” within the definition of the FCRA because it used its own internally generated information when denying credit to Nikou. The fact that INB supplied credit reporting agencies with information about Nikou does not create liability for INB. “Persons who do no more than furnish information to a credit reporting agency are not covered by the FCRA.”⁶⁰ Thus, the court of appeals concluded that “when a bank furnishes information based solely on its own experiences with the consumer, the information is not a consumer report and the bank is not under these circumstances a consumer reporting agency.”⁶¹

Congress intended that 15 U.S.C. § 1681h(e) would provide qualified immunity from common law actions based on consumer credit information.⁶² Section 1681h(e) provides as follows:

53. *Id.*

54. *Id.*

55. 15 U.S.C. § 1681a(f) (1988) defines a “consumer reporting agency” as:

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

56. 15 U.S.C. § 1681n (1988).

57. 15 U.S.C. § 1681o (1988).

58. *Nikou*, 638 N.E.2d at 453.

59. 15 U.S.C. § 1681a(d) (1988).

60. *Nikou*, 638 N.E.2d at 453 (citing *Alvarez Menendez v. Citibank*, 705 F. Supp. 67, 69 (D.P.R. 1988); *Mitchell v. First Nat'l Bank of Dozier*, 505 F. Supp. 176, 177-78 (M.D. Ala. 1981)).

61. *Id.* (citing *Alvarez Menendez*, 705 F. Supp. at 69; *Freeman v. Southern Nat'l Bank*, 531 F. Supp. 94, 95 (S.D. Tex. 1982); *Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985)).

62. *Id.* at 454 (citing *Alvarez Melendez*, 705 F. Supp. at 70; *Freeman*, 531 F. Supp. at 96).

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, except as to false information furnished with malice or willful intent to injure such consumer.⁶³

"Qualified immunity for sources of information, such as INB, is the 'quid pro quo' for full disclosure."⁶⁴ Thus, the court of appeals concluded that INB was immune from suit by Nikou unless Nikou could demonstrate that the information provided by INB to the credit reporting agencies was false, and that it was provided to those agencies because of malice or willful intent to damage Nikou.⁶⁵ Nikou failed to do so, resulting in a summary judgment against him.⁶⁶

In *Nikou v. INB National Bank*, the court of appeals addressed a bank's exposure to liability when reporting consumer credit information, and provided a good example of how the FCRA can be used by banks to terminate common law actions before they become financially oppressive.

IV. CONSUMER PROTECTION—CREDIT REPORTING AND AGENCIES

During the 1994 Survey period, the Federal Court for the Southern District of Indiana granted a motion to dismiss for failure to state a claim upon which relief can be granted and the issue was taken to the Seventh Circuit Court of Appeals.⁶⁷ At issue was whether a credit reporting agency could be liable for reporting misleading information obtained from a court's erroneous docket.

In *Henson v. CSC Credit Services*,⁶⁸ various consumer credit reporting agencies obtained and reported the erroneous information from a court docket that mistakenly identified Greg Henson as a judgment debtor. Jeff Henson borrowed money from Cosco Federal Credit Union in order to purchase a car owned by his brother Greg. Shortly thereafter, the car was stolen and Jeff stopped making payments to Cosco.⁶⁹ Cosco filed suit against Jeff and Greg alleging that Jeff defaulted on his loan. Greg was named in the action to determine whether he had any ownership interest or claim to the vehicle. The trial court entered a default judgment against both Jeff and Greg and found that Greg had no interest in the car.⁷⁰ Cosco later obtained a deficiency judgment against Jeff.⁷¹ The clerk of the court listed the deficiency judgment in the court's docket as being against

63. 15 U.S.C. § 1681h(e) (1988).

64. *Nikou*, 638 N.E.2d at 454.

65. *Id.*

66. *Id.*

67. *Henson v. CSC Credit Servs.*, 29 F.3d 280 (7th Cir. 1994).

68. *Id.*

69. *Id.* at 282.

70. *Id.*

71. *Id.* at 282-83.

both Jeff and Greg.⁷² Greg sought damages suffered as a result of dissemination of the erroneous report that he was a judgment debtor.

As a result of this misreporting, Greg alleged that he suffered “denial of credit, high interest loans, public ridicule and humiliation, and embarrassment”⁷³ and that the credit reporting agencies violated the FCRA by “erroneously report[ing] in its credit reports that Greg owed a money/civil judgment in the amount of \$4,076.”⁷⁴

The district court granted the defendant consumer credit reporting agency’s motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).⁷⁵ In doing so, “the district court noted that a consumer must allege that a credit reporting agency prepared a credit report containing inaccurate information to state a claim under the FCRA.”⁷⁶ Furthermore, the district court applied a “balancing test” previously formulated by the D.C. Circuit in *Koropoulos v. Credit Bureau, Inc.*⁷⁷ to determine whether “technically accurate” but misleading information may be inaccurate for purposes of the FCRA.⁷⁸ That test requires the court to “weigh the potential that the information will create a misleading impression against the availability of more accurate information . . . and the burden of providing that information.”⁷⁹

In this case, the district court found that “requiring [the credit reporting agencies] to have discovered the clerk’s erroneous entry of judgment against Greg is overly burdensome under the balancing test.”⁸⁰ Therefore, the district court granted the credit reporting agency’s motion to dismiss, finding that the information reported was not “inaccurate” under the FCRA.⁸¹

The United States Code provides that a consumer credit reporting agency is required to follow “reasonable procedures to assure maximum possible accuracy” of its consumer credit reports.⁸² Thus, the Seventh Circuit noted that a “credit reporting agency is not automatically liable even if the consumer proves that it prepared an inaccurate credit report because the FCRA ‘does not make reporting agencies strictly liable for all inaccuracies.’”⁸³ “A credit reporting agency is not liable under the FCRA if it followed ‘reasonable procedures to assure maximum possible accuracy,’ but nonetheless reported inaccurate information in the consumer’s credit report.”⁸⁴

The defendant credit reporting agencies asserted that they used the required “reasonable procedures,” and the court agreed, holding that “as a matter of law, a credit

72. *Id.* at 283.

73. *Id.* (quoting the Complaint).

74. *Id.*

75. *Id.*

76. *Id.* See *Henson v. CSC Credit Services*, 830 F. Supp. 1204, 1207 (S.D. Ind. 1993).

77. 734 F.2d 37 (D.C. Cir. 1984).

78. *Henson*, 29 F.3d at 283.

79. *Henson*, 29 F.3d at 283 (quoting *Koropoulos*, 734 F.2d at 42).

80. *Id.* (quoting *Henson*, 830 F. Supp. at 1207).

81. *Id.*

82. 15 U.S.C. § 1681e(b) (1988).

83. *Henson*, 29 F.3d at 284 (quoting *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991)).

84. *Id.* (quoting 15 U.S.C. § 1681e(b)).

reporting agency is not liable under the FCRA for reporting inaccurate information obtained from a court's Judgment Docket, absent prior notice from the consumer that the information may be inaccurate.⁸⁵ Thus, the court of appeals held that the district court correctly dismissed the complaint to the extent that it alleged that the credit reporting agencies had failed to follow reasonable procedures to assure maximum possible accuracy of the information contained in Henson's consumer credit report.⁸⁶

The balancing test adopted by the district court in *Henson* is a reasonable approach to determining when information reported by a consumer credit reporting agency under the FCRA is "accurate." Requiring complete accuracy, or imposing strict liability on consumer credit reporting agencies for reporting inaccurate information, would be cost-prohibitive and difficult to enforce. Such an approach would be inconsistent with the statutory goals of full and prompt disclosure of credit-worthiness and would require credit reporting agencies to look beyond the reports made to them, including court documents. With the approach used in *Henson*, the courts have struck a reasonable middle-ground, resulting in maximum efficiency while continuing to protect the public.

V. UNIFORM COMMERCIAL CODE—REVISION OF ARTICLE 2

In 1994 the American Law Institute and the National Conference of Commissioners on Uniform State Laws continued their efforts to redraft Article 2 of the Uniform Commercial Code. Last year's Survey Article reviewed the redraft of the scope section of Article 2 and advocated adopting a configuration implementing a hub and spoke format that anticipates and is adaptable to future technological advances.⁸⁷ Under such an approach, Article 2 would contain general principles that are applicable to all commercial contracts. Several sub-articles could then be developed, similar to Article 4A—Electronic Funds Transfers, in which more specific transactions, such as software contracts, could

85. *Id.* at 285.

86. *Id.* at 286.

87. See Judy L. Woods & Brad A. Galbraith, *Recent Developments In Contract And Commercial Law*, 27 IND. L. REV. 769, 776 (1994).

be addressed with particularity.⁸⁸ As of the latest redraft,⁸⁹ no significant changes to the scope section have been made since the draft discussed in last year's Survey Article.⁹⁰

88. See Raymond T. Nimmer et al., *License Contracts Under Article 2 Of The Uniform Commercial Code: A Proposal*, 19 RUTGERS COMPUTER & TECH. L.J. 281, 318-22 (1993).

89. Section 103 of the redraft of Article 2 currently is written as follows:

(a) Unless the context otherwise requires, this article applies to:

- (1) any transaction, regardless of form, that creates a contract for the sale of goods, including a transaction in which a sale of goods predominates;
- (2) any dispute relating to goods supplied under a transaction in which the sale of goods does not predominate; and
- (3) any dispute arising under an agreement obligating the seller to install, customize, service, repair, or replace goods at or after the time of contracting.

(b) If this article conflicts with Article 2A or 9 [deferred].

(c) A transaction subject to this article is also subject to [deferred].

U.C.C. § 2-103 (Tentative Revision of Article 2, Aug. 5, 1994).

90. See Woods & Galbraith, *supra* note 87.

1994 FEDERAL CIVIL PRACTICE AND PROCEDURE UPDATE FOR SEVENTH CIRCUIT PRACTITIONERS: A YEAR OF ADJUSTMENT

JOHN R. MALEY*

INTRODUCTION

Indiana practitioners litigating in federal court during 1994 experienced a year of adjustment to drastic changes imposed during 1993. With the sweeping revisions to the Federal Rules of Civil Procedure taking effect December 1, 1993, with local rules changes and civil justice reform plans in effect, and with numerous important decision from the Seventh Circuit and Indiana district courts, it has been no easy task for practitioners to keep informed. This Article analyzes these developments to assist Indiana attorneys in their federal civil litigation.

The subjects are presented in the order in which they often arise in litigation. As in past years, complex or difficult issues are thoroughly analyzed, while straightforward but novel developments are merely highlighted. For ease of future reference, the following table of contents outlines the subjects discussed:

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I. SUBJECT-MATTER JURISDICTION

A. Consenting To Magistrate Judges

In one of the more remarkable decisions of the year, the Seventh Circuit held that magistrate judges lack jurisdiction to try cases unless all parties expressly—not just

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implicitly—consent to the magistrate.¹ In *Mark I, Inc. v. Gruber*, the original parties to the action had signed consent forms agreeing to have a magistrate adjudicate the action. Two new defendants were added through amendment two years later. No one raised the issue of consent, and the new defendants never expressly consented to the magistrate.² A year later the magistrate tried the action, and one of the new defendants, Gruber, remained in the case at that point and participated in trial without objection. The magistrate found against Gruber, awarding plaintiff more than \$500,000.³

Gruber appealed on the merits. The Seventh Circuit, always scrupulous in its review of jurisdiction, raised the consent issue and ordered supplemental briefing. Not surprisingly, when “[o]ffered a belated opportunity to make his wishes known, Gruber . . . declined to consent.”⁴ In line with prior Seventh Circuit authority holding that consent to a magistrate under 28 U.S.C. § 636(c) must be “on the record and unequivocal,”⁵ the court held that the judgment had to be vacated and the action remanded to an Article III district judge. Writing for the panel, Judge Easterbrook noted that the consent “need not be in writing” as required in some courts,⁶ but must be “explicit and on the record.”⁷

The *Gruber* decision seems overly technical, particularly given the simple language of the magistrate consent statute.⁸ However, *Gruber* is consistent with the 1991 Seventh Circuit decision in *Jaliwala v. United States*,⁹ in which an appeal from a \$160 million judgment was dismissed because an intervening party had not consented orally nor in writing to trial by the magistrate.

The practical lessons, of course, are that magistrate consents should be either: (1) in writing and filed, or (2) made in open court on the record. For counsel retained to appeal from an adverse judgment before a magistrate, the other lesson is to immediately check to ascertain that such consent was expressly obtained.

B. Diversity Jurisdiction

Two Seventh Circuit decisions reinforce the importance of ensuring that diversity of citizenship is present for diversity cases. In *Dausch v. Rykse*,¹⁰ the Seventh Circuit delayed reaching the merits of an appeal to ascertain if diversity existed. Plaintiffs had alleged diversity based on residence.¹¹ For diversity jurisdiction to exist, however, the parties’ *citizenship* is what matters.¹² Because defective allegations of jurisdiction may

1. *Mark I, Inc. v. Gruber*, 38 F.3d 369, 370 (7th Cir. 1994).

2. *Id.*

3. *Id.* at 370-71.

4. *Id.* at 371.

5. *Id.* at 370 (citing *King v. Ionization Int’l, Inc.*, 825 F.2d 1180, 1185 (7th Cir. 1987); *Lovelace v. Dall*, 820 F.2d 223, 226 (7th Cir. 1987)).

6. *E.g., New York Chinese TV Programs, Inc. v. U.E. Enterprises*, 996 F.2d 21 (2d Cir. 1993).

7. *Gruber*, 38 F.3d at 371.

8. 28 U.S.C. § 636(c)(1) (1988 & Supp. 1994).

9. 945 F.2d 221, 223 (7th Cir. 1991).

10. 9 F.3d 1244 (7th Cir. 1993).

11. *Id.* at 1245.

12. *Id.*

be amended on appeal,¹³ the court ordered plaintiffs to submit affidavits "stating with precision" the basis for asserting diversity.¹⁴

In *Pollution Control Industries of America v. Van Gundy*,¹⁵ during discovery it was learned that one of the defendants was a citizen of the same state as the plaintiff. Nonetheless, the parties focused on personal jurisdiction issues. The district court eventually dismissed for lack of personal jurisdiction, and imposed sanctions against the plaintiff.¹⁶

On appeal, the Seventh Circuit addressed diversity, ruling that complete diversity was lacking because subject-matter jurisdiction did not exist.¹⁷ The court chastised the parties for bypassing this fundamental issue and focusing on personal jurisdiction. Although the court approved of sanctions for the plaintiff's failure to determine diversity,¹⁸ it criticized the defendants for not raising the issue earlier, and reduced the sanctions award considerably.¹⁹

Both cases serve as painful reminders that: (1) when pleading diversity, it is *citizenship*—not residence—that matters; and (2) special care should be taken to ensure that diversity jurisdiction exists from the outset of a case, for the Seventh Circuit will certainly raise the issue.

C. Supplemental Jurisdiction

Supplemental jurisdiction exists over state law claims that are "so related to claims . . . within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."²⁰ Under 28 U.S.C. § 1337(c)(3), district courts "may decline to exercise supplemental jurisdiction" if the federal or diversity claims have been dismissed.²¹

On its face, this law would appear to give the district courts discretion to hear—or not hear—supplemental claims after dismissal of the original claims. As noted in a previous article, however, the Seventh Circuit issued potentially conflicting opinions on this subject in 1993.²² In *Wentzka v. Gellman*,²³ the Seventh Circuit held that the district court abused its discretion by retaining a supplemental claim involving unsettled state law issues after dismissal of the federal claim.²⁴ By contrast, in *Brazinski v. Amoco Petroleum Additives*,²⁵ Chief Judge Posner, joined by Judges Kanne and Flaum, held that supplemental claims

13. 28 U.S.C. § 1653 (Supp. 1994).

14. *Dausch*, 9 F.3d at 1245.

15. 21 F.3d 152 (7th Cir. 1994).

16. *Id.* at 153.

17. *Id.* at 153-54.

18. *Id.* at 154.

19. *Id.* at 155-56.

20. 28 U.S.C. § 1337(a) (Supp. 1994).

21. 28 U.S.C. § 1337(c)(3) (Supp. 1994).

22. See John R. Maley, *1993 Federal Practice and Procedure Update for the Seventh Circuit Practitioner*, 27 IND. L. REV. 813, 818-20 (1994) [hereinafter "1993 Federal Practice"].

23. 991 F.2d 423 (7th Cir. 1993).

24. *Id.* at 426.

25. 6 F.3d 1176 (7th Cir. 1993).

can be retained after dismissal of federal claims, even absent extraordinary circumstances.²⁶

In a 1994 decision, *Timm v. The Mead Corporation*,²⁷ a panel comprised of Judges Flaum, Kanne, and Fairchild followed the *Brazinski* lead. The district court had granted summary judgment and dismissed an employee's federal discrimination claim, but retained and decided the supplemental state law claims in the same summary judgment ruling. On appeal, the employee argued that the state law claims should have been relinquished. The Seventh Circuit disagreed.²⁸

Writing for the panel, Judge Flaum noted that *Brazinski* "retreated somewhat from strong dicta in *Wentzka* . . . Instead," Judge Flaum wrote, "we recognized [in *Brazinski*] that especially when difficult and unsettled state law issues are not implicated by the pendent claims, it is entirely acceptable under the discretionary principle for a federal court to decide those claims even after dismissing the main claim."²⁹ So long as "an arguable balance of [judicial economy, convenience, fairness, and comity] points in the direction of the district court's discretionary determination whether or not to exercise jurisdiction, that decision, being discretionary, will not be disturbed."³⁰

Judge Flaum noted some of the factors that should be considered in deciding whether to retain a supplemental claim, including "the nature of the state law claims at issue, their ease of resolution, and the actual, and avoidable, expenditure of judicial resources."³¹ Also, a pre-trial dismissal of federal claims "informs the balance" but is not dispositive. He added: "Exactly when before trial the federal claim is eliminated, however, is relevant. For example, dismissal at the pleading stage usually counsels strongly in favor of relinquishing jurisdiction because at that point in a case 'judicial resources' typically are yet to be heavily tapped."³²

After *Timm*, district judges in this circuit should be freer to exercise discretion under 28 U.S.C. § 1337(c) and retain supplemental jurisdiction where it is deemed appropriate. To lessen the chances of reversal, the *Timm* factors should be recited in any order retaining supplemental jurisdiction.

D. Miscellaneous Jurisdictional Items

The following developments, although not strictly jurisdictional, are worthy of brief mention:

- (1) The Seventh Circuit held that the standard of review for *Younger*-based abstention dismissals is *de novo*.³³ After noting that prior Seventh Circuit decisions had suggested or applied an abuse of discretion standard,³⁴ the court

26. *Id.* at 1182.

27. 32 F.3d 273 (7th Cir. 1994).

28. *Id.* at 274.

29. *Id.* at 277.

30. *Id.*

31. *Id.*

32. *Id.* at n.2 (citing *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1251 (7th Cir. 1994)).

33. See *Younger v. Harris*, 401 U.S. 37 (1971).

34. *A.G. Edwards & Sons, Inc. v. Public Bldg. Comm'n*, 921 F.2d 118, 121 (7th Cir. 1990) (suggesting

held that *de novo* review is mandatory for *Younger* abstention because, unlike other forms of abstention, "application of the *Younger* doctrine is absolute."³⁵ When a case fits within *Younger*, abstention is mandatory, so there is no discretion to exercise.³⁶

(2) Where a forum selection clause required suit in "the state of Indiana in the courts of general jurisdiction for Evansville, Indiana," Judge Brooks remanded a removed action to state court on the basis that federal courts are courts of limited jurisdiction, whereas Indiana trial courts are courts of general jurisdiction.³⁷

II. REMOVAL

Although it should be a simple process, removal continues to be a hotly litigated matter. Key developments during 1994 include:

(1) Defendant's receipt of a copy of the complaint will ordinarily start the thirty-day clock of 28 U.S.C. § 1446(b) for removal, regardless of whether formal service has been effected.³⁸

(2) Examples of "non-service" receipt that will start the removal clock include: (a) delivery of the complaint by a process server that is not otherwise effective as service of process; (b) attempted service by mail where the recipient refuses to sign and return the acknowledgement; and (c) transmission of a copy of the complaint by one defendant to a co-defendant before service is effected on the co-defendant.³⁹

(3) Removal ordinarily requires "joinder" of all defendants, and the Seventh Circuit interprets this mandate to require such joinder to be in writing; a removing defendant cannot simply recite that other defendants do not object to removal.⁴⁰

(4) Removal of a facially non-diverse action may be possible where a non-diverse defendant is fraudulently joined, which arises either when there is "no possibility that plaintiff can state a cause of action against the non-diverse

that abuse of discretion governs all abstention decisions); *Sekerez v. Supreme Court of Ind.*, 685 F.2d 202, 205-06 (7th Cir. 1982) (applying abuse of discretion standard to a *Younger*-based abstention).

35. *Trust & Inv. Advisers, Inc. v. Hogsett*, 43 F.3d 290, 294 (7th Cir. 1994).

36. *Id.*

37. *Wats/800, Inc. v. Voice America*, 867 F. Supp. 811, 812-13 (S.D. Ind. 1993).

38. *Rose v. O'Donahue*, 38 F.3d 298, 303 (7th Cir. 1994).

39. *Id.* at 302-03.

40. *Id.* at 302. As noted in the 1993 Federal Practice Article, the mechanics for expressing such joinder (e.g., whether through separate removal notices or one notice signed by all defendants) are unclear in this Circuit. See 1993 *Federal Practice*, *supra* note 22, at 821-23. To be safe, defendants should seek to obtain each defendant's signature on the removal notice. If that is not possible, each defendant's oral consent to removal should be obtained within the 30-day period, and each should promptly file a brief notice noting their joinder in removal and the date it was given.

defendant, or where there has been outright fraud in the pleading of jurisdictional facts.”⁴¹

(5) In one of his first published opinions, Judge Hamilton held that an Indiana garnishment action is sufficiently independent of the underlying state court action to be separately removable to federal court.⁴²

Finally, in a case of first impression, the Seventh Circuit held that a district court may not remand a case on its own motion for a defect in removal procedure.⁴³ The district judge had remanded the case to state court *sua sponte*, and the case came to the Seventh Circuit on a writ of mandamus. Writing for the panel in *In re Continental Casualty Co.*, Judge Easterbrook began by quoting 28 U.S.C. § 1447(c), which reads in part: “A motion to remand the case on the basis of any defect in the removal procedure must be made within [thirty] days after the filing of the notice of the removal”⁴⁴ In light of this “motion” language, settled authority that procedural removal defects can be waived, and the policy in favor of vesting a case in one forum, Judge Easterbrook concluded that district courts lack authority to remand cases for defects in removal procedure absent a motion from the plaintiff.

Judge Easterbrook concluded the opinion, writing:

District judges who look carefully at newly filed or removed cases, and identify potential defects in their institution or removal, do both the parties and the legal system a great service. We commend the district judge for his care and alertness in spotting the potential problem. But because not all potential problems are fatal, the court should alert the parties before dismissing or remanding the cases. Litigants may have sufficient answers to the court’s concerns Or litigants may elect to surrender their entitlement to insist on procedural perfection Quick notice is a boon; quick action without inviting the parties’ submissions may illustrate the adage that haste makes waste.⁴⁵

III. SERVICE OF PROCESS

Insufficient service must be raised in the answer or responsive motion to dismiss or it is waived.⁴⁶ But even if the defense is timely raised in the answer, insufficient service still can be waived. The defendant learned that lesson in *Leslie v. St. Vincent New Hope, Inc.*,⁴⁷ in which Judge Hamilton ruled that the defendant had waived the defense, even though it had been timely raised in the answer, by participating substantially in the litigation before moving to dismiss.

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41. Hoosier Energy Rural Elec. Coop. v. Amoco Tax Leasing IV Corp., 34 F.3d 1310, 1315 (7th Cir. 1994).
 42. Harding Hospital v. Sovchen, 868 F. Supp. 1074, 1078 (S.D. Ind. 1994).
 43. *In re Continental Casualty Co.*, 29 F.3d 292 (7th Cir. 1994).
 44. 28 U.S.C. § 1447(c) (1988 & Supp. 1994).
 45. *In re Continental Casualty Co.*, 29 F.3d at 295.
 46. FED. R. CIV. P. 12(h).
 47. 873 F. Supp. 1250 (S.D. Ind. 1995).

In *Leslie*, the plaintiff filed the action in June 1994. The defendant timely filed its answer two months later in August, raising insufficient service as a defense. In November, the defendant moved to dismiss on this basis. Judge Hamilton denied the motion, not on its merits (indeed, service had not been effected), but based on waiver. The defendant had appeared in the action, submitted a case management plan, and submitted preliminary witness and exhibit lists and contentions. Citing a 1991 Seventh Circuit decision explaining that this defense may be waived by "submission through conduct,"⁴⁸ Judge Hamilton determined that the defendant "ha[d] participated extensively in preparing [the] case for trial," and thus had waived the defense.

The Seventh Circuit upheld a district court's finding of waiver of a similar defense (personal jurisdiction) based on less complicated facts. In *Continental Bank v. Meyer*,⁴⁹ the defendants fully participated in litigating the merits for over two-and-a-half years without actively contesting personal jurisdiction. They participated in lengthy discovery, and engaged in motions practice. Although the defendants literally complied with Rule 12(h) by raising the defense in their answer, the Seventh Circuit affirmed the finding of waiver, noting that defendants "did not comply with the spirit of the rule, which is to expedite and simplify proceedings in the Federal Courts."⁵⁰

The decisions in *Leslie* and *Continental Bank* teach that waivable defenses must not only be raised in the answer, but should also be promptly asserted in a separate motion to dismiss.

IV. VOLUNTARY DISMISSAL

Rule 41(a)(2) of the Federal Rules of Civil Procedure provides that "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." In *Marlow v. Winston & Strawn*,⁵¹ the plaintiff moved to dismiss without prejudice under this rule after several years of litigation. The defendants asked the district court to require payment of their fees as a condition of such a dismissal. The district court instead dismissed the case with prejudice.

On appeal, the Seventh Circuit reversed. Although dismissal with prejudice is a permissible condition, the Seventh Circuit held that the plaintiff moving for voluntary dismissal under Rule 41(a)(2) must first have the "option of withdrawing his motion if the district court's conditions are too onerous."⁵² Because the district court never gave the plaintiff the chance to reject the "condition" of dismissal with prejudice, the dismissal was reversed.

48. *Id.* at 1252 (quoting *Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir. 1991)).

49. 10 F.3d 1293 (7th Cir. 1993).

50. *Id.* at 1297 (citation omitted).

51. 19 F.3d 300 (7th Cir. 1994).

52. *Id.* at 304.

V. FAILURE TO PROSECUTE

Rule 41(b) provides that for "failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant."⁵³ This rule came into play in several cases.

In *McMahan v. CCC Express*,⁵⁴ plaintiffs filed their action, effected service, and then reached an agreement with defendant's insurance carrier for an indefinite extension of time for the defendant to respond to pending settlement discussions. After six months of no activity, the court had no notice of the extension, and ordered the plaintiffs to show cause why the action should not be dismissed for failure to prosecute. The plaintiffs advised the court of the extension, and asked forgiveness.

After noting the parties' failure to comply with local rules regarding extension, Judge Moody allowed the case to proceed without dismissal. He issued the following warning that should be heeded:

The court will . . . not dismiss this action. To do so would unfairly penalize plaintiffs where defendants are equally culpable. In addition, the court is aware that litigants in the past have circumvented the above-discussed rules through agreements similar to the one here. *That will no longer be the case in this court. Agreements between parties to ignore the Rules of Civil Procedure will not be allowed to sidetrack the orderly progress of litigation.*⁵⁵

In *Johnson v. Kamminga*,⁵⁶ the Seventh Circuit affirmed a Rule 41(b) dismissal with prejudice in a case that had been pending for seven years due to plaintiff's delays, and in which plaintiff failed to appear for the first day of trial. In this respect the decision is unremarkable, but it provides a good summary of Seventh Circuit standards for Rule 41(b), including:

- (1) Rule 41(b) dismissals are reviewed for abuse of discretion, with the district court's findings of fact reversed only if clearly erroneous.⁵⁷
- (2) The Seventh Circuit "presumes . . . that the district judge acted reasonably and will reverse 'only if it is plain either that the dismissal was a mistake or that the judge did not consider factors essential to the exercise of a sound discretion.'"⁵⁸

53. FED. R. CIV. P. 41(b). In both the Northern and Southern Districts of Indiana, identical local rules supplement this rule as follows:

Civil cases in which no action of record has been taken for a period of six (6) months may be dismissed for want of prosecution with judgment for costs after thirty (30) days notice given by the clerk to the attorneys of record (or, in the case of a pro se party, to the party) unless, for good cause shown, the court orders otherwise.

See S.D. IND. LR 41.1; N.D. IND. LR 41.1.

54. 153 F.R.D. 633 (N.D. Ind. 1994).

55. *Id.* at 634 (emphasis added).

56. 34 F.3d 466 (7th Cir. 1994).

57. *Id.* at 468.

58. *Id.* (citations omitted).

(3) District judges are not required to employ "progressive discipline" before ultimately dismissing a case for want of prosecution.⁵⁹

(4) Although district courts are encouraged to warn litigants before dismissing a case for failure to prosecute, whether they in fact do so is clearly within their discretion.⁶⁰

VI. INTERVENTION

Several important intervention decisions were rendered during 1994. In *NBD Bank v. Bennett*,⁶¹ Magistrate Judge Shields, in one of her first published opinions on the federal bench, denied intervention in an important insurance and banking case. NBD sought to enjoin the Indiana Insurance Commissioner's geographic restrictions on NBD's sale of insurance. The Indiana State Association of Life Underwriters and the Independent Insurance Agents of Indiana sought to intervene or alternatively appear as amici. Not surprisingly, the intervenors opposed NBD's requested relief, and claimed that if granted the requested relief would harm their insurance sales.

Judge Shields denied intervention, first holding that the standards for intervention as of right under Rule 24(a)(2) were not satisfied. The key issue was whether the intervenors "claim[ed] an interest relating to the property or transaction at issue."⁶² Judge Shields held that the interest necessary for Rule 24(a)(2) must be a "direct, significant legally protectable interest."⁶³ Noting no Seventh Circuit authority on point, she held that an "economic interest that might be adversely affected by the outcome of the case alone is insufficient to warrant intervention under Rule 24(a)(2)."⁶⁴ In addition, the intervenors failed to show that the Insurance Commissioner did not adequately represent their interests.

As for permissive intervention under Rule 24(b), Judge Shields observed that the intervenors presented no additional claims, but simply sought to defend the claims raised by NBD. As a result, Judge Shields found intervention inappropriate, but did allow participation as amici.⁶⁵

In *Shea v. Angulo*,⁶⁶ appeal was taken from denial of intervention. In the clearest statement on the point from the Seventh Circuit, the court wrote, "We have jurisdiction pursuant to 28 U.S.C. § 1291 because the denial of a motion to intervene, whether as of

59. *Id.* (citations omitted).

60. *Id.* (citations omitted).

61. 159 F.R.D. 505 (S.D. Ind. 1994).

62. FED. R. CIV. P. 24(a)(2).

63. *NBD*, 159 F.R.D. at 506 (quoting *American Nat'l Bank & Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 145 (7th Cir. 1989)).

64. *Id.* (quoting *Getty Oil Co. v. Department of Energy*, 865 F.2d 270, 276 (Tem. Em. Ct. App. 1988)).

65. *Id.* at 508.

66. 19 F.3d 343 (7th Cir. 1994).

right or by permission of the court, is treated in this Circuit as a final appealable order."⁶⁷ Thus, unsuccessful intervention must be appealed immediately, if at all.

VII. DISCOVERY

As in the last few years, numerous developments occurred in the discovery area during the Survey period.

A. Mandatory Disclosure

With Rule 26(a)'s mandatory disclosure rules taking effect at the national level on December 1, 1993, the Northern and Southern Districts of Indiana determined to what extent mandatory disclosure would occur in each District.⁶⁸

In the Northern District, mandatory disclosure is alive and well. Although each judge is handling mandatory disclosure somewhat differently, neither the Northern District nor any judge in the Northern District has opted out of mandatory disclosure on a wholesale basis.⁶⁹ Indeed, the Northern District had experimented with mandatory disclosure in its Civil Justice Reform Plan as early as 1991,⁷⁰ and apparently approved of the experience.

In the Southern District, the court has adopted a flexible approach. Mandatory initial disclosure under Rule 26(a)(1) is not required unless agreed to by the parties or specifically ordered by the court.⁷¹ Expert disclosure under Rule 26(a)(2) is required,⁷² as it should be, given the rule's lack of an opt-out provision.⁷³

67. *Id.* at 344 (citing *B.H. by Pierce v. Murphy*, 984 F.2d 196, 199, 200 (7th Cir. 1993); *Peacock v. Board of Sch. Comm'r's of Indianapolis*, 721 F.2d 210, 212 n.2 (7th Cir. 1983)).

68. Mandatory disclosure under FED. R. CIV. P. 26(a) is broken into three parts. Rule 26(a)(1) requires initial disclosure of certain core information, except to the extent "otherwise stipulated or directed by order or local rule." Rule 26(a)(2) requires disclosure of testifying experts, including preparation and disclosure of written reports and background information. Unlike Rule 26(a)(1), Rule 26(a)(2) does not allow an opt out by local rule. Rule 26(a)(3) requires certain disclosures (witnesses, exhibits, etc.) prior to trial.

69. The Northern District has not opted out of any portions of Rule 26(a) by local rule, and indeed is pressing ahead with Rule 26(a)'s requirements, although to different degrees and in somewhat different ways depending upon the case and the judge.

70. CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (N.D. Ind. 1991).

71. S.D. IND. LR 26.3 provides:

All cases pending or filed in the Southern District shall be exempt from the requirements of the following provisions of the Federal Rules of Civil Procedure as amended effective December 1, 1993: FED. R. CIV. P. 26(a)(1); FED. R. CIV. P. 26(d); FED. R. CIV. P. 26(f). This rule does not preclude parties from entering into voluntary stipulations to comply with any or all of the above-referenced amended Federal Rule in a particular case, nor does it preclude the Court from ordering compliance with FED. R. CIV. P. 26(a)(1) in a particular case.

72. *Id.*

73. See FED. R. CIV. P. 26(a)(2). Parties may, however, stipulate away this requirement.

B. Case Law Highlights

Noteworthy developments in discovery case law include the following:

- (1) Judge Moody held that a subpoena can be served by certified mail under Rule 45(b)(1)'s "delivery" requirement.⁷⁴
- (2) Magistrate Judge Hussmann held that defense counsel in a personal injury action could conduct ex parte interviews with plaintiff's physicians where there was no showing that the physician had "potentially embarrassing or ruinous" information unrelated to the injuries at issue.⁷⁵
- (3) In a thorough opinion outlining key standards for the issue, Magistrate Judge Cosbey held that analysis done by an environmental consulting firm prior to litigation was protected from discovery because the firm was retained in anticipation of litigation, and no exceptional circumstances were shown for disclosure.⁷⁶
- (4) Where a plaintiff did not have the power to order a third party to surrender documents, the plaintiff did not have "possession, custody or control" under Rule 34, and thus was not obligated to produce the requested documents.⁷⁷
- (5) In *Jepson, Inc. v. Makita Electric Works*,⁷⁸ two parties entered into a protective order to preserve the confidentiality of certain discovery materials. The order was challenged but enforced in the district court.⁷⁹ The Seventh Circuit reversed, holding that protective orders cannot be issued under Rule 26(c) without an express finding of "good cause" for confidentiality.⁸⁰
- (6) Where a plaintiff's deposition was repeatedly rescheduled to accommodate him but he failed to attend, the Seventh Circuit affirmed the district court's dismissal of his action with prejudice as a discovery sanction under Rule 37(b)(2).⁸¹

Finally, in addressing a question of first impression in the Seventh Circuit, Judge Tinder issued a comprehensive opinion addressing discovery of defense surveillance videos by plaintiffs. His decision in *Fisher v. National Railroad Passenger Corp.*⁸² is a "must-read" for practitioners involved in litigation that might involve surveillance.

74. Doe v. Hersemann, 155 F.R.D. 630 (N.D. Ind. 1994).

75. Garcia v. Abbott Lab., No. TH93-97-C, slip op. (S.D. Ind. March 29, 1994). *Garcia* was decided as a matter of federal procedural law. As a matter of Indiana procedural law, the Indiana Court of Appeals has held that ex parte communications with physicians are disfavored. Cua v. Morrison, 626 N.E.2d 581 (Ind. Ct. App. 1993).

76. Hartford Fire Ins. v. Pure Air On The Lake Ltd., 154 F.R.D. 202 (N.D. Ind. 1993).

77. Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1426 (7th Cir. 1993).

78. 30 F.3d 854 (7th Cir. 1994).

79. See *Jepson, Inc. v. Makita Elec. Works*, 143 F.R.D. 657 (N.D. Ill. 1992).

80. *Jepson*, 30 F.3d at 860.

81. Halas v. Consumer Services, Inc., 16 F.3d 161, 164-165 (7th Cir. 1994).

82. 152 F.R.D. 145 (S.D. Ind. 1993).

Fisher involved an action under the Federal Employers' Liability Act (FELA)⁸³ for injuries sustained by a railroad worker. The defendant conducted secret surveillance to monitor the plaintiff's physical activities. The plaintiff served interrogatories asking whether any such surveillance had been taken.⁸⁴ The defendant objected on the grounds that such evidence constituted trial preparation materials, and also encompassed impeachment material not discoverable under local rules.⁸⁵

The plaintiff initially did not challenge the objection. After the plaintiff's deposition, the defendant produced a single videotape, noting that it was the only tape the defendant intended to introduce at trial. The plaintiff moved to compel disclosure of all videotapes, not just those to be used at trial.

After noting that courts "[a]lmost uniformly" require evidentiary videos to be produced, Judge Tinder turned to the issue at hand: whether "surveillance tapes of a [p]laintiff which [d]efendant does not intend to introduce at trial, but which it possesses, are discoverable by the [p]laintiff prior to trial."⁸⁶ Judge Tinder determined that the work-product doctrine precluded discovery of the tapes that the defendant did not intend to introduce at trial and that the plaintiff had not shown a "substantial need" for the videos.⁸⁷ He concluded: "Although today's decision is, of course, confined to the facts and arguments presented by the present parties, it is difficult to conceive of any circumstances which might prove so compelling as to justify disclosure of non-evidentiary videotapes and the concomitant intrusion into attorney work product."⁸⁸

Fisher is an excellent primer on the issue, and strikes an appropriate balance between open discovery and the work-product doctrine. The only uncertainty left by the posture of the case is whether surveillance tapes that are solely for impeachment or rebuttal would actually be protected by the Southern District's Local Rule 16.1(f)(5) and (7). On its face, *Fisher* only addresses surveillance videotapes to be used as *substantive* evidence, and not "solely for impeachment or rebuttal" per the Southern District's Local Rule 16.1(f)(5) and (7). In the surveillance context, however, it is difficult to imagine a tape that would be used solely for impeachment or rebuttal; most tapes would not only impair the plaintiff's credibility, but they would also be relevant to the substantive issue of damages. Defense counsel should thus presume that any tapes to be used at trial will be discoverable.

83. Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988).

84. As will be seen, this was a prudent course of action that should be taken by every plaintiff.

85. See S.D. IND. LR 16.1(f)(5),(7) (As directed by the court, each party shall submit to the court and opposing counsel a "list of exhibits to be offered at trial, except those to be used solely for impeachment or rebuttal," and a "list of names and addresses of witnesses to be called, except for those to be called solely for impeachment or rebuttal."). The Northern District's local rule is identical. See N.D. IND. LR 16.1(f)(5), (7).

86. *Fisher*, 152 F.R.D. at 145.

87. *Id.* at 158.

88. *Id.*

VIII. EXPERTS

As discussed in the 1993 Federal Practice Article,⁸⁹ the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals*⁹⁰ changed the standard for addressing the admissibility of expert testimony. The old *Frye* rule of "general acceptance" was abandoned in favor of a more flexible, but probably more restrictive, standard that focuses on the scientific, technical, or otherwise specialized basis of the testimony.⁹¹ *Daubert* also emphasized the district judge's responsibility to serve as "gatekeeper" and screen out expert testimony that does not satisfy the *Daubert* standards.

As expected, there has been much litigation on the issue since *Daubert*, and the real battlefield is in the trial court. The following cases illustrate the profound effects of *Daubert*:

- (1) In *O'Conner v. Commonwealth Edison Co.*,⁹² the plaintiff sued the operator of a nuclear power plant for allegedly causing cataracts. The defendant moved for summary judgment on a number of grounds, including causation. The district court granted the summary judgment motion, ruling, in part, that the plaintiff's expert's testimony was inadmissible. The Seventh Circuit affirmed, holding that the expert's opinions did not satisfy *Daubert* and Federal Rule of Evidence 702. The doctor's testimony that he "know[s] what cataracts look like when they've been induced by radiation" was held to be unscientific.⁹³ No other sources supported the opinion that mere observation could discern whether cataracts were caused by radiation, and the "expert" had not tested his opinion.⁹⁴
- (2) In *Pries v. Honda Motor Co.*,⁹⁵ the Seventh Circuit similarly rejected an expert's methodology as unscientific. The plaintiff sued Honda for an allegedly defective seatbelt. The district court granted summary judgment. On appeal, the plaintiff pointed to her expert's opinion that the seatbelt latch opened during the crash. However, the expert conducted no tests and could not explain the forces that would cause the latch to open. In affirming summary judgment, Judge Easterbrook cited *Daubert* and concluded, "Evidence of this kind is not scientific and does not satisfy Federal Rule of Evidence 702."⁹⁶
- (3) In *Bradley v. Brown*,⁹⁷ Judge Moody applied *Daubert* to reject two expert opinions that the plaintiff suffered from "multiple chemical sensitivity" due to exposure to defendant's products. In a thorough opinion tracing *Daubert* and its progeny, Judge Moody concluded that "the 'science' of MCS's etiology has not

89. 1993 *Federal Practice*, *supra* note 22, at 833-36.

90. 113 S. Ct. 2786 (1993).

91. The *Frye* rule stemmed from *Frye v. United States*, 293 F. 1013 (1923).

92. 13 F.3d 1090 (7th Cir. 1994).

93. *Id.* at 1107.

94. *Id.* at 1106-07.

95. 31 F.3d 543 (7th Cir. 1994).

96. *Id.* at 545.

97. 852 F. Supp. 690 (N.D. Ind. 1994).

progressed from the plausible, that is, the hypothetical, to knowledge capable of assisting a fact-finder, jury or judge.”⁹⁸

(4) On appeal, the Seventh Circuit affirmed, and refused to disturb Judge Moody’s evidentiary ruling.⁹⁹ The court applied a two-tiered standard of review, asking first by de novo review whether the district court properly followed the framework set forth in *Daubert*.¹⁰⁰ Upon finding no error in that regard, the court stated that it would “not disturb the district court’s findings unless they [were] clearly erroneous.”¹⁰¹ The Seventh Circuit ultimately concluded that it would “not replace the district court’s careful decision with our own judgment.”¹⁰²

(5) The Seventh Circuit, through Chief Judge Posner, blasted an expert in a trademark infringement case involving the Indianapolis Colts.¹⁰³ Judge Posner noted that the expert provided a “perfunctory affidavit,” that it was a “kindness” for Judge McKinney to give the affidavit any weight at all, and that the expert had been criticized by another federal court for his methodology.¹⁰⁴ Judge Posner added, “[W]e hope that he will take these criticisms to heart in his next courtroom appearance.”¹⁰⁵

(6) In the most telling post-*Daubert* decision, on remand from the Supreme Court’s decision in *Daubert* itself, the Ninth Circuit rejected the plaintiff’s expert opinions that Bendectin causes birth defects.¹⁰⁶ Of particular note is the Ninth Circuit’s skepticism of experts who offer opinions for the first time in litigation without any prior testing or experience in the matter at issue.¹⁰⁷

Finally, in what may be the most significant development in expert testimony during the Survey period, the Federal Judicial Center published its *Reference Manual on Scientific Evidence* (“the Manual”).¹⁰⁸ The Federal Judicial Center began work on the Manual in 1990 after the Federal Courts Study Committee recommended such a work.¹⁰⁹ The stated purpose of the 637-page Manual “is to assist judges in managing expert evidence, primarily in cases involving issues of science or technology.”¹¹⁰

The Manual was distributed to all federal judges in early 1995. It is being provided at no or low cost to subscribers of *Weinstein’s Evidence* or Professors Wright and Miller’s

98. *Id.* at 700.

99. *Bradley v. Brown*, 42 F.3d 434 (7th Cir. 1994).

100. *Id.* at 436.

101. *Id.* at 436-37.

102. *Id.* at 439.

103. *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club*, 34 F.3d 410 (7th Cir. 1994).

104. *Id.* at 415.

105. *Id.*

106. *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1319 (9th Cir. 1995).

107. *Id.* at 1318-19.

108. *FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (1994).

109. *Id.* at vii.

110. *Id.* at 1.

Federal Practice and Procedure. It is also available from major legal publishers such as West and Lawyer's Co-Op for as low as \$12.50.

Divided into three distinct sections, the Manual is an essential source for any practitioner encountering experts in federal litigation. The opening section provides an overview of basic principles for expert testimony, including *Daubert* and the Federal Rules of Evidence. The second section is a series of detailed "Reference Guides" on specific expert topics, including epidemiology, toxicology, survey research, DNA, statistics, multiple regression, and economic losses. Each reference guide provides an excellent overview of the subject, and is loaded with citations to technical publications and reported cases addressing key issues. Finally, the third section addresses court-appointed experts and special masters.

As district judges exercise their "gatekeeper" roles under *Daubert*, they are likely to turn to the Manual for assistance. Practitioners are well-advised to get their own copy and use it to their advantage.

IX. SUMMARY JUDGMENT

A. Detail In The Trial Court

Three Seventh Circuit decisions reinforce the maxim that parties opposing summary judgment must focus on details in the district court. In *Waldrige v. American Hoechst Corp.*,¹¹¹ Judge Tinder granted summary judgment for the defendants in a personal injury action. One of the grounds for granting summary judgment was the plaintiff's failure to comply with the Local Rules by failing to properly identify the evidence supporting her claims.¹¹²

The Seventh Circuit affirmed, offering a lengthy opinion on the importance of local rules such as the Southern District's summary judgment rule. Judge Rovner explained the Seventh Circuit's favorable view of these rules, noting:

We have endorsed the exacting obligation these rules impose on a party contesting summary judgment to highlight which factual averments are in conflict as well as what record evidence there is to confirm the dispute, explaining that district courts are not obliged in our adversary system to scour the record looking for factual disputes and may adopt local rules reasonably designed to streamline the resolution of summary judgment motions. . . . We have also repeatedly upheld the strict enforcement of these rules, sustaining the entry of summary judgment when the non-movant has failed to submit a factual statement in the form called for by the pertinent rule and thereby conceded the movant's version of the facts.¹¹³

The Seventh Circuit further held that even though the defendants had not raised the plaintiff's failure to follow the local rule, the district court was within its discretion to detect the omission and apply the local rule strictly.¹¹⁴

111. 24 F.3d 918 (7th Cir. 1994).

112. *Id.* at 922. See also S.D. IND. LR 56.1.

113. *Id.* at 921-22 (citations omitted).

114. *Id.* at 923-24.

Similarly, in *Doe v. R.R. Donnelley & Sons Co.*,¹¹⁵ Chief Judge Barker granted summary judgment for the defendant in an employment discrimination case. In affirming her decision, the Seventh Circuit noted the plaintiff's failure to provide sufficient detail in the trial court record:

Like the district court, we can rule only on the basis of what is in the record before us—a record that was made by the parties in the district court. This case, like so many other cases that come before us on appeal from the grant of a summary judgment, brings with it a record that can be charitably characterized as “under nourished.” The standards established by the Supreme Court . . . have been repeated time and time again in our reported decisions, and we must expect that the parties will live up to the obligations imposed by those decisions by making an adequate record in the district court. *Cases such as this one are won by attention to detail and completeness in the litigation of the summary judgment motion in the district court; they cannot be won in this court when the appropriate record has not been made.*¹¹⁶

Finally, in *Wallace v. Tilley*,¹¹⁷ the district court granted summary judgment. Four days later, the plaintiff filed a deposition taken three months before the court's ruling and asked the court to supplement the record and deny summary judgment. The district court refused, and the Seventh Circuit affirmed. Writing for the panel, Judge Flaum explained:

Neither [the plaintiff's] brief nor his oral argument provided any reason for this delay. [His] “wait and see” approach conflicts with the procedure established in the Federal Rules for dealing with unavailable discovery materials. If [the plaintiff] needed additional time for discovery to prepare his response to the summary judgment motion, he should have filed an affidavit to that effect pursuant to Federal Rule of Civil Procedure 56(f).¹¹⁸

The lessons of these cases are clear. Parties opposing summary judgment must strictly comply with local rules, must pay particular attention to detail in the record, and must seek leave through Rule 56(f) when more time is required to obtain evidence for summary judgment.¹¹⁹

B. Conversions From Rule 12(b)(6)

Rule 12(b) provides that when a 12(b)(6) dismissal motion is supported by matters outside the pleadings, “the motion shall be treated as one for summary judgment and

115. 42 F.3d 439 (7th Cir. 1994).

116. *Id.* at 447-48 (emphasis added).

117. 41 F.3d 296 (7th Cir. 1994).

118. *Id.* at 302.

119. Indeed, in *Doe*, the plaintiff argued on appeal that her position was supported by one of her interrogatory answers. Unfortunately, however, plaintiff's counsel failed to include the interrogatory in the record on appeal, so the Seventh Circuit wrote that it could not “consider her interrogatory because it is not contained in the record.” 42 F.3d at 447 n.7.

disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.”¹²⁰

In *Burick v. Edward Rose & Sons*,¹²¹ the district court converted a 12(b)(6) dismissal motion into a summary judgment motion but failed to give the plaintiff notice of the conversion.¹²² The Seventh Circuit reversed, requiring remand so that notice could be given along with an opportunity to respond. Judge Kanne explained:

In this circuit, to avoid the problems raised by such surprise, we have urged district judges to give notice when they intend to convert a 12(b)(6) motion to dismiss into a motion for summary judgment. . . . [However,] [r]ather than applying a bright-line rule when a district judge fails to give notice, we determine whether the parties could have submitted specific controverted material factual issues to the trial court had they been given notice that the 12(b)(6) motion was to be treated as a motion for summary judgment.¹²³

Because the plaintiff had evidence to create an issue of fact, the court held that reversal and remand was necessary.¹²⁴

C. Specificity Suggested In Summary Judgment Denials

In *Pasquino v. Prather*,¹²⁵ the district court denied a motion for summary judgment raising qualified immunity, stating simply that “there are issues of material fact that are in dispute which preclude summary judgment.”¹²⁶ The Seventh Circuit remanded the matter for an explanation of the basis for the denial, explaining, “Conclusory rulings are inadequate material for the tools of the appellate bench.”¹²⁷

Writing for the panel, Judge Ripple noted that Circuit Rule 50 requires a district court to state its reasons for dismissals and grants of summary judgment. Although the rule is silent on denials, he concluded that “[t]he same reasons that justify the application of Circuit Rule 50 to dismissals . . . and grants of summary judgment . . . apply to appealable denials of summary judgment.”¹²⁸ Although Judge Ripple left it to the court’s procedures committee to consider an absolute rule requiring explanation of qualified immunity summary judgment denials, he did find such explanation necessary in *Pasquino*.

Although *Pasquino* involved qualified immunity, an issue that is immediately appealable as a collateral order,¹²⁹ the rationale for the decision, coupled with Circuit Rule 50, suggests that denials of summary judgment should be explained. Indeed, if nothing else, such clarification could help the parties analyze the strengths and weaknesses of their cases and perhaps lead to an informed settlement.

120. FED. R. CIV. P. 12(b).

121. 18 F.3d 514 (7th Cir. 1994).

122. *Id.* at 515.

123. *Id.* at 516 (citations omitted).

124. *Id.* at 516-17.

125. 13 F.3d 1049 (7th Cir. 1994).

126. *Id.* at 1050.

127. *Id.* at 1051.

128. *Id.*

129. *Mitchell v. Forsythe*, 472 U.S. 511, 530 (1985).

D. Denials Of Summary Judgment Cannot BeAppealed After Trial

Finally, in *Watson v. Amedco Steel, Inc.*,¹³⁰ the plaintiff moved for summary judgment in his age-discrimination claim. Chief Judge Barker denied the motion, and the case was tried to a jury, which found for the employer. The plaintiff appealed but did not challenge the unfavorable verdict. Instead, the plaintiff argued on appeal that summary judgment should have been granted. The Seventh Circuit affirmed judgment for the employer, holding that a denial of summary judgment cannot be challenged after a full trial on the merits. Absent an “extraordinary circumstance,” such review is unavailable in the Seventh Circuit.¹³¹

To preserve the issue raised at summary judgment, the plaintiff would have had to move for judgment as a matter of law pursuant to Rule 50(a)(1) at the close of the defendant’s case or at the conclusion of the evidence and then renew that motion after the jury’s verdict pursuant to Rule 50(b). The plaintiff never made such Rule 50 motions, so the Seventh Circuit held that he had waived the claimed error.¹³²

X. SETTLEMENT

Several significant decisions were rendered involving settlements, as follows:

- (1) When parties settle a case in federal court, unless the district court specifically retains jurisdiction over the settlement, any action for breach of the settlement agreement must have its own independent basis for subject-matter jurisdiction (e.g., diversity jurisdiction). Otherwise, it is a mere state-law breach of contract action that must be brought in state court.¹³³
- (2) When a case was settled the morning of oral argument, the Seventh Circuit nonetheless issued an opinion reminding the bar that when settlement is delayed to the last minute, significant costs are incurred that could be avoided.¹³⁴
- (3) In an unrelated case, Chief Judge Posner chastised counsel for failing to advise the district court of a settlement, writing, “We repeat our admonition . . . that in order to spare busy courts unnecessary work, parties must advise a court when settlement is imminent. . . . The duty is implicit in the characterization of lawyers as officers of the court, and a breach of it therefore opens a lawyer to sanctions.”¹³⁵

130. 29 F.3d 274 (7th Cir. 1994).

131. *Id.* at 280. In *Trustees of Ind. Univ. v. Aetna Cas. & Sur. Co.*, 920 F.2d 429 (7th Cir. 1990), the court reviewed a denial of summary judgment after trial. In *Watson*, however, the Seventh Circuit “disavow[ed]” *Trustees*. Indeed, in light of the departure from *Trustees* and pursuant to Circuit Rule 40(f), the panel circulated *Watson* to all judges of the Seventh Circuit, but no judge desired to rehear the case en banc. *Watson*, 29 F.3d at 278 n.7. Thus, *Watson* stands as the authoritative Seventh Circuit decision on the subject.

132. *Watson*, 29 F.3d at 280.

133. *Kokkonen v. Guardian Life Ins.*, 114 S. Ct. 1673 (1994).

134. *Chicago Title & Trust Co. v. Verona Sports Inc.*, 11 F.3d 678 (7th Cir. 1993).

135. *Gould v. Bowyer*, 11 F.3d 82 (7th Cir. 1993). Notably, the Southern District of Indiana has a local rule requiring parties to “immediately notify the Court of any reasonably anticipated settlement of a case or the

(4) Where parties agreed to a settlement orally in open court but later disagreed over final terms, the district court enforced the oral settlement agreement, and the Seventh Circuit affirmed.¹³⁶

(5) The Supreme Court held that when settlement is reached after an appeal is taken, the underlying judgment ordinarily should not be vacated due to the public's interest in the judgment.¹³⁷

(6) A district court's refusal to enforce a settlement agreement during litigation is not immediately appealable as a collateral order.¹³⁸

XI. POST-JUDGMENT

A. Determining Whether A Motion Is Based On Rule 59 or Rule 60

In *Helm v. Resolution Trust Corp.*,¹³⁹ the plaintiff's suit was dismissed for lack of subject matter jurisdiction. Plaintiff moved to reconsider the dismissal twenty-eight days later. The district court treated the motion as a Rule 59(e) motion to alter or amend the judgment. Because Rule 59(e) motions must be served not later than ten days after judgment, the district court denied the motion as untimely.

On appeal, the Seventh Circuit reversed, holding that the motion should have been considered timely under Rule 60(b)'s standards. Writing for the panel, Judge Kanne explained that the Seventh Circuit has

established a bright-line rule for distinguishing 59(e) motions from 60(b) motions. The time of a motion's service controls whether a motion challenging a judgment is a 60(b) or 59(e) motion. Such a motion, if served within ten days of a final judgment, is a 59(e) motion. Conversely, a motion served more than ten days after a final judgment is a 60(b) motion.¹⁴⁰

Of course, the standards and effects of the two motions are different (*e.g.*, a Rule 59(e) motion tolls the time for appeal and generally requires a lower threshold of proof than Rule 60(b)). Thus, practitioners ordinarily should seek to submit any post-judgment motion within ten days of judgment.

B. Timeliness Of Fee Petitions

As amended on December 1, 1993, Rule 54(d)(2)(B) provides that unless "otherwise provided by statute or order of the court," a motion for attorneys' fees must be filed and served no later than fourteen days after entry of judgment.¹⁴¹ In *Johnson v. Lafayette Fire Fighters Ass'n Local 472*,¹⁴² the prevailing plaintiffs overlooked the rule when they filed

resolution of any pending motion." S.D. IND. LR 7.1(d).

136. *Wilson v. Wilson*, 46 F.3d 660 (7th Cir. 1995).

137. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994).

138. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992 (1994).

139. 43 F.3d 1163 (7th Cir. 1995).

140. *Id.* at 1166-67 (citations omitted).

141. FED. R. CIV. P. 54(d)(2)(B).

142. No. 4:92-C-V-60-AS, slip op. (N.D. Ind. Apr. 20, 1994).

their fee petition thirty-nine days after judgment. The defendant objected to the petition as untimely. Chief Judge Sharp, however, relied on the Northern District's Local Rule 54.1, which at the time allowed ninety days for fee petitions.¹⁴³ The *Johnson* decision was affirmed on appeal, with the Seventh Circuit reasoning that "a local rule is an order of the court, at least for the purposes of [Federal Rule of Civil Procedure] 54(d)(2)(B)." ¹⁴⁴

It is respectfully submitted that the Southern District correctly determined that the old ninety-day period of the local rule was inconsistent with amended Federal Rule of Civil Procedure 54. Although Judge Sharp and the Seventh Circuit concluded that the language of Rule 54 "is large enough to encompass Local Rule 54.1 as an 'order of the court,'" ¹⁴⁵ the drafters of the federal rules specifically use the term "local rule" in other opt-out provisions (e.g., Federal Rule of Civil Procedure 26(a)(1)). Thus, the argument goes, if the drafters wanted to allow local rules to provide a different time period, they would have said so.

XII. COSTS

Several significant costs decisions were rendered during the Survey period, including the following:

- (1) When the clerk taxes costs, Rule 54(d) provides that "[o]n motion served within five days thereafter, the action of the clerk may be reviewed by the court." When a party filed its motion for review one day late, the Seventh Circuit held that the five-day rule of Rule 54(d) is not jurisdictional such that the court did not err in hearing the motion.¹⁴⁶
- (2) Under Rule 54(d)(1), costs "shall be allowed as of course to the prevailing party unless the court otherwise directs." Applying this rule, the Seventh Circuit reversed a district court's unexplained denial of costs to a prevailing party.¹⁴⁷ Judge Easterbrook chastised the district court, noting that "[d]iscretion without a criterion for its exercise is authorization of arbitrariness" and holding that the defendant "[was] entitled to costs as a matter of law" because the defendant "prevailed on every claim."¹⁴⁸
- (3) The Seventh Circuit affirmed an award of costs against a prisoner who claimed indigency, noting that a plaintiff's indigency "does not require the court to automatically waive costs."¹⁴⁹

143. N.D. IND. LR 54.1 (1994). The Northern District has since promulgated an amendment that would track the corresponding federal rule and require fee petitions to be filed within 14 days of judgment. See *Proposed Amendments To The Local Rules* (N.D. Ind. Nov. 1, 1994). The Southern District has similarly promulgated, and passed, an amendment deleting the old 90-day period for fee petitions of S.D. IND. LR 54.1 as "inconsistent" with FED. R. CIV. P. 54.

144. 1995 WL 147024 (7th Cir. Apr. 5, 1995) (To be reported at 51 F.3d 726).

145. *Johnson*, No. 4:92-C-V-60-AS at 2.

146. *Lorenz v. Valley Forge Ins. Co.*, 23 F.3d 1259, 1261 (7th Cir. 1994).

147. *York Center Park Dist. v. Krilich*, 40 F.3d 205, 209 (7th Cir. 1994).

148. *Id.* at 209.

149. *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994).

(4) The Seventh Circuit affirmed Judge Barker's award of costs exceeding \$37,000 to a party that prevailed in the "substantial part of the litigation," even though it did not prevail on all claims.¹⁵⁰

(5) The Seventh Circuit reversed an award of costs exceeding \$30,000 for computerized legal research, holding that such research costs are to be considered attorneys' fees.¹⁵¹

XIII. SANCTIONS

As in past years, several awards of sanctions were made in the Seventh Circuit. Among the most interesting decisions are the following:

(1) In *Rice v. Nova Biomedical Corp.*,¹⁵² Judge Posner stated that: "Their arguments . . . fall far below professional standards of advocacy in this circuit. We do not tolerate blunderbuss appeals loaded with frivolous scattershot that wastes our time and appellees' money."¹⁵³

(2) The Seventh Circuit noted in *Widell v. Wolf*¹⁵⁴ that "Widell's appeal was doomed, and accordingly it appears to be frivolous within the meaning of [Federal Rule of Appellate Procedure] 38."¹⁵⁵

(3) *Stookey v. Teller Trading Distributors, Inc.*¹⁵⁶ held that "[S]anctions are warranted because defendants' blatant disregard for this court's rules needlessly resulted in added expense to appellees and the waste of judicial resources."¹⁵⁷

(4) The Northern District of Indiana imposed sanctions of \$6000 in *Baker v. American Juice, Inc.*¹⁵⁸ for counsel's prosecution of a "baseless" lawsuit.

(5) In *Ormsby Motors, Inc. v. General Motors Corp.*,¹⁵⁹ the Seventh Circuit denied appellate sanctions where the appellant had dismissed its appeal. The court noted that a voluntary dismissal will not preclude sanctions, but explained that "only in an exceptional case would we be inclined to grant such relief" where the appellant has dismissed its appeal.

Finally, in perhaps the most amusing decision of the year, an Indianapolis attorney challenged Judge Tinder's award of Rule 11 sanctions.¹⁶⁰ In his defense, counsel waxed

150. O.K. Sand & Gravel, Inc. v. Martin Marietta Tech., Inc., 36 F.3d 565 (7th Cir. 1994).

151. Haroco, Inc. v. American Nat'l Bank & Trust Co., 38 F.3d 1429 (7th Cir. 1994).

152. 38 F.3d 909 (7th Cir. 1994).

153. *Id.* at 918.

154. 43 F.3d 1150 (7th Cir. 1994).

155. *Id.* at 1151.

156. 9 F.3d 631 (7th Cir. 1993).

157. *Id.* at 638.

158. 870 F. Supp. 878 (N.D. Ind. 1994); No. 2:93 CV262 Jm., 1994 WL 750614 (N.D. Ind. Aug. 9, 1994).

159. 32 F.3d 240, 241 (7th Cir. 1994).

160. Chambers v. American Trans Air, 17 F.3d 998 (7th Cir. 1994).

nostalgic about his high school and college credentials, ranging from being a state debate champion, having two varsity letters in a “collision sport,” and being president “of what may well have been the strongest fraternity on campus.”¹⁶¹ Not surprisingly, the Seventh Circuit was unmoved by the argument.

Writing for the panel, Judge Cudahy explained the court’s decision in a style similar to that of Judges Easterbrook and Posner:

[U]nfortunately for [plaintiff’s counsel], this long list of accolades and accomplishments provides no defense. As we noted in *Thornton*, the “[t]est under Rule 11 is objective.” The point is that “every lawyer must do the necessary work to find the law before filing the brief.” That admonition applies even to lawyers who have two varsity letters in a collision sport and who were presidents of their fraternities. [Counsel] failed to comply with the rule’s clear edict, and the district court was correct to impose sanctions.¹⁶²

The opinion confirms what is obvious to most practitioners: When sanctions are threatened or imposed, boasting of one’s successes (particularly irrelevant ones) is not a prudent course.

161. *Id.* at 1006.

162. *Id.* at 1006-07 (citing *Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986)).

IN SEARCH OF ACCOUNTABILITY: THE LEGISLATIVE RE-INVENTION OF ENVIRONMENTAL LAW AND POLICY IN INDIANA

ROBERT F. BLOMQUIST*

INTRODUCTION

For we must consider that we shall be as a City upon a hill. The eyes of all people are upon us. Soe that if we shall deal falsely . . . in this work we have undertaken . . . we shall be made a story and a byword throughout the world.¹

ac•count•a•ble...adj. 1. Answerable. 2. Capable of being explained. — See synonyms at *responsible*.²

Cries of inadequate resources will no longer be acceptable. Everyone will be watching the [Indiana Department of Environmental Management]—both opponents and proponents. It's a tremendous burden.³

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1. ROBERT C. WINTHROP, LIFE AND LETTERS OF JOHN WINTHROP 19 (1867), *quoted in* CONGRESSIONAL RESEARCH SERVICE, RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 302 (Suzy Platt ed., 1989) [hereinafter CONGRESSIONAL RESEARCH SERVICE DICTIONARY]. John Winthrop was Governor of the Massachusetts Bay Colony when he penned the quoted statement, part of a discourse entitled *A Modell of Christian Charity*, written aboard the ship *Arbella* during his voyage to Massachusetts in 1630. *Id.*

President-elect John F. Kennedy said, in an address to the Massachusetts Legislature on January 9, 1961: I have been guided by the standard John Winthrop set before his shipmates . . . 331 years ago, as they, too, faced the task of building a government . . . “We must always consider,” he said, “that we shall be as a city upon a hill—the eyes of all people are upon us.” Today the eyes of all people are truly upon us—and our governments, in every branch, at every level, national, State, and local, must be as a city upon a hill—constructed and inhabited by [people] aware of their grave trust and their grave responsibilities.

107 CONG. REC. A169 app. (1961), *quoted in* CONGRESSIONAL RESEARCH SERVICE DICTIONARY, *supra*, at 302.

2. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 9 (1969) (certain typeface changed).

3. Kyle Niederpruem, *Environmental Agency Feeling Heat to Improve*, INDIANAPOLIS STAR, Mar. 13, 1994, at A1 [hereinafter *Feeling Heat*] (quoting Representative Brian C. Bosma (R-Indianapolis), as he described the pressure and expectations on the Indiana Department of Environmental Management (IDEM) to improve its performance as a result of increasing funding in the compromise legislation).

In all activities of our Agency, we strive to:

- Be professional, accountable, and deserving of the public's trust.
- Be fair and consistent.
- Continuously improve the products and services we provide to protect our environment.
- Communicate our intent and rationale clearly, both within our Agency and to the people we serve.⁴

The political branches of Indiana State government—the General Assembly and the Governor—turned a monumental policy corner during 1994 by agreeing to substantially increase funding of the Indiana Department of Environmental Management (IDEM) in exchange for increased Agency accountability. Without a doubt, this development—the result of contentious and extended compromise—was one of the key legal stories of the year in Indiana, shaping and influencing vast stretches of the environmental law and policy landscape.⁵ A major consequence of the funding-for-enhanced-accountability deal

4. IDEM, A STRATEGIC COURSE FOR THE INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT 3 (1994) [hereinafter IDEM STRATEGIC PLAN—1994].

5. This development was extensively analyzed and interpreted in the popular and business presses. See *Feeling Heat*, *supra* note 3, for a thorough political discussion of the dynamics behind the legislation. As noted in that article:

Before the legislature convened in January [1994], Gov. Evan Bayh had put the U.S. Environmental Protection Agency on notice: Without adequate funding, three of the states' major regulatory programs would be returned to the federal government.

Using the EPA as bogeyman paid off.

Though many lawmakers scoffed at the threat, the legislature did approve a funding bill [signed by the governor]. Industries, cities and towns also agreed to pay higher permit fees to discharge their pollutants into Indiana's air, water and land.

Well-known national rankings that put Indiana last and least when it comes to investment in the environment now might change. But it won't be an overnight change, and environmental officials say this funding certainly isn't a permanent fix to all ills.

....

At least three groups—two created by recent legislation—will be watching the agency's performance. Also, the agency must publish a report on its progress by January 1995.

The governor called that process "overseers overseeing overseers."

"It's an additional burden, but one that's understandable . . . I welcome accountability. I want the process to work. All I care about is the end result," Bayh said.

Many lawmakers believe that expectations for the agency to suddenly become functional are unrealistic. Nearly two years could pass before enough people are hired and trained to improve the way the agency had operated during its leaner years under two different political administrations.

....

"The entire agency has a huge influx of cash from here on out," said Blake R. Jeffery, environmental affairs director for the Indiana Manufacturers Association, one of the agency's

was the State of Indiana's retention of "primacy" over federally-delegated program responsibilities in issuing Resource Conservation and Recovery Act (RCRA) permits for hazardous waste management and National Pollution Discharge Elimination System (NPDES) water permits, instead of becoming the first state in American environmental history to voluntarily return to the United States Environmental Protection Agency (EPA)

most vocal critics. The manufacturers, like other industry groups that lobbied for the funding bill, will be watching carefully.

....

Industry groups and lawmakers insisted on accountability measures. If they were going to fund the agency with higher permit fees, then they wanted guarantees money would be well spent. Translation: Better service and less heavy-handed enforcement.

Starting July 1, 1995, the agency must be able to meet new permit deadlines. A backlog in waste water and solid waste programs has hurt Indiana industry, lobbyists complained. Businesses rely on state permits to be issued in a timely manner to operate or expand.

After that date, if new permit deadlines aren't met, other options kick in, such as allowing the company to hire an outside consultant to review and approve the permit. Regular reports on permit activity must also be filed with the governor and the legislature.

Industry groups loaded up the bill with favorable measures early in the legislative session. They argued for broad amnesty provisions that would have allowed companies to build, operate and pollute without any state oversight. Those kinds of provisions brought swift reaction from [IDEM Commissioner Kathy] Prosser, who testified that they weren't in the best interests of the state.

Eventually, much of industry's wish list was scaled back. But not enough for environmental groups. Many continue to believe that measures in the funding bill have significantly hobbled the agency. They feel so strongly that many are threatening to petition the EPA to take state programs back.

Lack of support from environmentalists has been one of the governor's major disappointments.

"To say a doubling of funding is not progress, well, I have a difference of opinion," Bayh said. "This is not an all or nothing business. Government is the art of the practical. There has to be give and take. It's the nature of democracy."

The money pooled from permit fees, state and federal funds more than doubles funding in three program areas: solid and hazardous waste and waste water.

Feeling Heat, *supra* note 3 at A1, A6. See also *Activists Target New Law*, GARY POST-Tribune, Mar. 4, 1994, at B1 ("Indiana environmentalists have asked the federal government to strip the state of its environmental authority in advance of a new law they say will further weaken an already ineffective agency."); *Environmental Push*, COURIER-JOURNAL, Jan. 29, 1994, at 14A ("After much hand-wringing and a high-powered task force study, the legislature is ready to reinstate the agency's fee collecting authority and give it more money. The Governor triumphantly proclaimed that Indiana may again be up to managing its own environmental affairs."); *IDEM Leader Seeks, But Doesn't Find, Some Environmental Empathy*, GARY POST-Tribune, Apr. 12, 1994, at A-6; Kyle Niederpruem, *Environment Bill Compromise Reached*, INDIANAPOLIS STAR, Jan. 27, 1994, at B1 ("The funding provisions of the bill . . . [were] not contested. That's because a multi-interest task force recommended the same amount of funding [\$18.7 million a year] to the legislature . . ."); *Senate Bill 417 Moves Closer to Passage*, 5 LEGIS. REP., Feb. 18, 1994, at 1 ("Having voiced strong opposition to the bill when it was being considered by the Senate, IDEM now views SB 417 as a reasonable compromise.").

previously delegated environmental powers.⁶ Another significant consequence of the legislative compromise is the sunnier prospect for IDEM to be able to achieve some of its ambitious goals for improving the quality of the Hoosier environment, as reflected in its strategic plan promulgated in 1994.⁷

6. See generally Robert F. Blomquist, "Turning Point": *The Foundering of Environmental Law and Policy in Indiana?*, 27 IND. L. REV. 1033, 1033-45 (1994). See also *infra* notes 11-12 and accompanying text.

7. See IDEM STRATEGIC PLAN—1994, *supra* note 4. As optimistically noted by IDEM Commissioner Kathy Prosser:

Actions of the 1994 General Assembly will enable the Indiana Department of Environmental Management to provide better environmental protection than ever before.

... IDEM . . . will begin to implement our strategic plan, with goals that include pollution prevention, reducing toxic emissions, meeting surface water and air quality standards, reducing solid waste, protecting groundwater and cleaning up contaminated sites.

2 IND. ENVIR. 2 (1994) [hereinafter IND. ENVIR.] (INDIANA ENVIRONMENT is a newsletter published by IDEM). In general, IDEM selected "eight environmental priorities": to "prevent pollution," "reduce toxic emissions," "meet air quality standards," "meet surface water quality standards," "target Northwest Indiana," "reduce solid waste," "protect groundwater," and "clean up and prevent contaminated sites." IDEM STRATEGIC PLAN—1994, *supra* note 4, at 4 (capitalization in text altered). IDEM's first-mentioned specific strategic plan component—"prevent[ing] pollution"—provides an insight into IDEM's policy priorities for the next several years. IDEM states:

Status: Traditionally, environmental management techniques and regulatory policies have been geared toward the treatment and disposal of toxic wastes. This form of environmental protection is extremely costly for manufacturers in terms of compliance and handling. Secondly, this "end-of-pipe" approach may result in the shifting of wastes from one environmental medium to another (i.e., air to land) and it often fails to take into account the heavy burden placed on the environment as a whole. By preventing pollution, however, industries can avoid the regulatory burdens of treatment and disposal because the waste is never created. Also, industries can gain operating flexibility and avoid civil liability by preventing pollution. More importantly, preventing pollution is the best form of environmental protection. Therefore, we will:

- A. Continue developing policies and programs to reduce the generation of municipal wastes, toxic materials and hazardous wastes and pollutants, by means of industrial pollution prevention.
- B. Continue to increase coordination between the divisions of IDEM and between IDEM and other government regulatory programs with responsibilities and duties related to toxic materials and environmental wastes.
- C. Continue to operate and expand a state information clearinghouse for pollution prevention.
- D. Continue providing technical assistance both within IDEM and to other government regulatory programs, local and state government entities and businesses.
- E. Continue providing pollution prevention awards, education and training to businesses, and developing publications on pollution prevention techniques.

IDEM STRATEGIC PLAN, *supra* note 4, at 4. Compare IDEM STRATEGIC PLAN—1994, *supra* note 4, at 6 (In order to "reduce toxic releases in the state as the second-mentioned IDEM priority, and to meet Indiana's goal of reducing releases of industrial toxics into the environment by 50 percent by the end of 1995—based on a 1988

This Article is divided into three major parts. Given the seminal importance of the legislation—which substantially increased IDEM funding while it mandated an elaborate scheme of oversight and study of the efficiency of the Agency's operations and simultaneously granted selective regulatory concessions to industry—Part I focuses on the background and details of Senate Enrolled Act (SEA) 417—the legislative vehicle implementing the remarkable compromise.⁸ Part II discusses other important Indiana environmental and natural resources statutes enacted into law during 1994.⁹ Finally, Part III of the Article concludes by analyzing significant state judicial decisions that interpret Indiana environmental and natural resources law and key federal court opinions that address specific Indiana environmental controversies.¹⁰

baseline—IDEML will, *inter alia*, [e]ncourage Indiana businesses to participate in a toxics reduction program”; “[c]ontinue to provide technical assistance, pilot awards, education, and training to industries, organizations, and educational institutions in order to find non-toxic substitutes for toxic materials and install clean processes and technologies”; “[i]mplement new federal air toxic regulations with a focus on air toxic releases in urban areas”; “[r]equire toxic reductions necessary to meet the state’s surface water quality standards”; and “[f]ully implement the Pollution Prevention and Safe Materials Act . . . [which] requir[es] . . . encouraging regulatory flexibility to promote pollution prevention, increasing coordinating of toxic reduction efforts within IDEM, operating a state information clearinghouse, and establishing the Pollution Prevention and Safe Materials Institute.”); IDEM, ENVIRONMENTAL REPORT 4-6 (1993) (“Many of the steps necessary to prevent pollution are the same ones associated with quality control, increased efficiency and reduced costs. Moreover, companies reduce their regulatory liability [by] coming into compliance and saving disposal costs.”); Blomquist, *supra* note 6, at 1049-54 (discussing Indiana’s pollution prevention legislation passed during 1993); Robert F. Blomquist, *The Evolution of Indiana Environmental Law: A View Toward the Future*, 24 IND. L. REV. 789, 809-12 (1991) (discussing Indiana pollution prevention legislation passed during 1990); *infra* notes 126-30 and accompanying text (discussing Indiana pollution prevention legislation passed during 1994).

8. See *infra* notes 13-104 and accompanying text.

9. By comparison, the United States Congress established a rather bleak record in failing to pass any significant environmental and natural resources legislation at the federal level during 1993-1994, as discussed in *View From the Ivory Tower More Rosy Than Media's*, 52 CONG. Q. 2850 (Oct. 8, 1994).

10. Environmental rulemaking, an important component of the evolving environmental law in Indiana and at the federal level, is beyond the scope of this Article. Moreover, legal developments pertaining to environmental implications of property transfers is beyond the scope of this Article. See generally GREAT LAKES ENVIRONMENTAL TRANSACTIONS GUIDE (Robert F. Blomquist gen. ed., 1995). However, because of its importance, the rulemaking action taken by the Indiana Air Pollution Control Board on March 10, 1994, is worthy of brief mention herein. See generally 17 Ind. Reg. 1878 (Mar. 10, 1994). The following account is a summary of the Board’s action:

On March 10, 1994, the Indiana Air Pollution Control Board gave final approval to a set of far-reaching changes to the Indiana air permit rules.

Indiana can now assemble its package for USEPA approval.

Best guesses are that EPA will complete its approval process by the end of [1994]. The date of EPA approval starts the 12-month timetable for all who are covered to apply for a Title V operating permit.

....
Significant state rule changes include:

- Changing the construction permit rule to coordinate with the operating permit; for

sources controlled by rules restricting rate of emissions, thresholds will now be based on allowable instead of "potential, uncontrolled" emissions[;]

- Public involvement is increased; for a new source (or first new Title V operating permit), all neighbors must be notified[;]
- Emergency notification is changed for large sources; any exceedance of any magnitude or duration must be reported to IDEM within 4 hours[;]
- A preventative maintenance plan must be in the Title V permit application[;]
- Establishing fees of \$1,500 per year, plus \$33 per ton of actual emission with a cap of \$150,000 for most permit holders; this rises with the consumer price index.

MEDIATOR, Mar.-Apr. 1994, at 1 (MEDIATOR is a newsletter published by Indiana Environmental Institute, Inc., Indianapolis, Ind.). Cf. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 2 (codified at IND. CODE § 13-1-1-25 (1993)) (establishing a Title V operating permit program trust fund "to provide a source of funds for the implementation, enforcement, and administration of the operating permit program required to implement 42 U.S.C. 7661 through 7661f of the [F]ederal Clean Air Act"). See also *infra* notes 82 to 86 and accompanying text.

For brief journalistic descriptions of Indiana environmental controversies and developments reported during 1994, see, e.g., Michael Briggs, *EPA Threatens to Halt State's Road Funding*, CHI. SUN-TIMES, Jan. 8, 1994, at 3 (describing the EPAs threats to withhold federal highway aid from Indiana and Illinois unless the states upgrade vehicle emission testing programs in the Chicago area); *Class-Action Suit Filed Against Superfund Site*, CHI. TRIB., May 17, 1994, at 3 (discussing a class-action lawsuit filed in Indianapolis by 40 families who claimed that the Avanti Development company and at least ten other firms contributed to contamination of the site); *Deadline Near for Indiana Clean Air Plan*, CHI. SUN-TIMES, July 26, 1994, at 14 ("Indiana is among nine states facing federal sanctions beginning in September unless it adopts a program to reduce air pollution in Lake and Porter counties."); *Environmental Cleanup Starts at Refinery Site*, CHI. TRIB., Sept. 20, 1994, at 3 (discussing \$2 million environmental cleanup of Princeton, Indiana site); *Federal Regulations Close 9 Landfills*, CHI. TRIB., June 21, 1994, at 3 (explaining that nine non-hazardous solid waste landfills around Indiana were forced to close because of strict new federal regulations governing waste disposal); *4 Indiana Cities Off EPA's Ozone List*, CHI. TRIB., June 23, 1994, at 3 (noting that South Bend, Elkhart, Indianapolis & Evansville now meet EPA standards for ground level ozone pollution); Adam W. Keats, *Hammond Facility Top Receiver of Toxic Chemicals*, CHI. TRIB., Apr. 19, 1994, at 2 (discussing report about Rhone-Poulenc Basic Chemical Co.'s Hammond, Indiana facility, which allegedly received more toxic chemical shipments by weight in 1991 than any other facility in the nation—204 million pounds of toxic chemicals—which was 63 million pounds more than the second-ranked facility); *Inland Remains State's Leading Polluter*, GARY POST-TRIB., Apr. 20, 1994, at B1 ("According to EPA numbers, Indiana remained in fifth place among states for toxic chemical releases. . . . Nationwide, the EPA's Toxic Release Inventory for 1992 showed that release of toxic chemicals declined by 6.6 percent, or 224 million pounds, compared to 1991. The discharges dropped by 35 percent compared to the . . . baseline year of 1988."); *Trail Creek Fish Safe, State Declares*, CHI. TRIB., May 5, 1994, at 3 (discussing validity of reports concerning contaminated fish taken from a creek near an allegedly leaking Superfund site); James L. Tyson, *Delicate Ecosystem, Heavy Industry*, CHRISTIAN SCI. MONITOR, Mar. 14, 1994, at 11 (discussing the Great Lakes Commission's Sustainable Development Initiative for Northwest Indiana); *U.S. Will Try Once Again to Clean Up Illegal Dump*, CHI. TRIB., July 18, 1994, at 3 (reporting on EPA's plans to conduct tests to see if "auto fluff" can neutralize cancer-causing PCBs and lead at the H&H dump in Hammond, Indiana).

I. SENATE ENROLLED ACT 417

In a March 1994 letter from Governor Evan Bayh to Carole Browner, Administrator of the United States Environmental Protection Agency, the State notified federal officials that Indiana would not—contrary to earlier communications¹¹—be the first state in the nation to voluntarily turn back previously delegated environmental regulatory responsibilities to the federal government:

As you will recall, in a letter dated September 8, 1993, I informed you of a funding deficiency in Indiana's National Pollutant Discharge Elimination System (NPDES) and Resource Conservation and Recovery Act (RCRA) permitting programs. I also informed you that the state intended to begin the process of voluntarily returning the federally delegated permitting responsibilities in these programs pursuant to 40 CFR 271.23(a) (RCRA) and 40 CFR 123.64(a) (NPDES). I also indicated that if the budget deficiencies were adequately addressed in the 1994 legislative session, the State of Indiana intended to retain primacy over these programs.

I am pleased to inform you that the Indiana General Assembly has addressed the funding crisis for the Indiana Department of Environmental Management. Today, I have signed into law Senate Enrolled Act 417, which provides more than \$18 million in funding for permitting functions in the NPDES and RCRA permitting programs.

Therefore, please accept this letter as my formal notification to you that the State of Indiana will maintain primacy over the RCRA and NPDES permitting functions.¹²

The full measure of SEA 417, however, cannot be taken without discussing seven key legislative innovations that, when viewed holistically, represent a fundamental reformulation and re-invention of environmental law and policy in Indiana: (1) increased IDEM funding, (2) enhanced IDEM responsibilities for processing permits, (3) voluntary environmental audit confidentiality, (4) IDEM responsibilities for establishing voluntary compliance programs, (5) amnesty opportunities for non-complying air pollution emitters, (6) establishment of the Environment Rulemaking Study Committee, and (7) establishment of the Environmental Quality Service Council.

A. IDEM Funding

The Indiana General Assembly utilized its collective imagination during 1994 to transcend its previous impasse with the Governor by agreeing on two essential revenue-raising measures: (1) legislatively set fees for NPDES and solid and hazardous waste permits,¹³ supplemented by (2) a “mixed” funding approach, which directed that

11. See Blomquist, *supra* note 6, at 1034 (quoting Letter from Governor Evan Bayh to Carole Browner, EPA Administrator (Sept. 8, 1993)).

12. Letter from Governor Evan Bayh to Carole Browner, EPA Administrator (March 17, 1994).

13. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994, § 7 (codified at IND. CODE § 13-7-16.1-1 to -3 (Supp. 1994)).

appropriations for these programs come from both permitting fees and general funds.¹⁴ "With the passage of Senate Enrolled Act 417, IDEM will receive more than \$10 million in new permit fees. Combined with existing funds, the additional money available to the agency totals more than \$18 million [per year]."¹⁵

An interesting innovation of SEA 417 is its funneling of environmental permit fees into a dedicated state fund—the newly-minted "environmental management permit operation fund."¹⁶ According to one commentator, "[t]his fund will prevent these fee

14. *Id.*

15. IND. ENVIR., *supra* note 7, at 2. According to Commissioner Prosser's assessment, these additional funds will result in the following public benefits:

IDEM will fill 95 vacant positions in our water and solid and hazardous waste offices, and create more than 150 new positions in our water and solid and hazardous waste offices, and create more than 150 new positions in the permitting, inspection and data monitoring functions. The Air Pollution Control Board also approved new air permit fees allowing IDEM to hire 75 new staff immediately, and as many as 75 more by the end of the year.

New revenues provided through the fees will provide for state-of-the-art technology, as well. IDEM will computerize and automate many agency records, providing better access to the public and increasing the efficiency of the regulatory programs. We will improve monitoring Indiana's environment and decrease turn-around time on permit applications. We also will be able to apply Indiana's new water quality standards to wastewater removal applications.

....
[O]ne of the most important things Senate Enrolled Act 417 allows this agency to do is further invest in staff. Governor Evan Bayh agreed to release \$3 million in state revenues to fund salary differentials for IDEM technical and professional staff. This will help IDEM attract and retain quality staff.

IND. ENVIR., *supra* note 7, at 2. *But cf.* the rich tradition of American skepticism toward the desirability and efficacy of increased government spending, as illustrated by remarks of President Grover Cleveland:

It is the duty of those serving the people in [a] public place closely to limit public expenditures to the actual needs of the government. Economically administered, because this bounds the right of the government to extract tribute from the earnings of labor or the property of the citizen, and because public extravagance begets extravagance among the people. We should never be ashamed of the simplicity and prudential economies which are best suited to the operation of a republican form of government and most compatible with the mission of the American people. Those who are selected for a limited time to manage public affairs are still of the people, and may do much by their example to encourage, consistently with the dignity of their official functions, that plain way of life which among their fellow-citizens aids integrity and promotes thrift and prosperity.

Quoted in CONGRESSIONAL RESEARCH SERVICE DICTIONARY, supra note 1, at 154. Calvin Coolidge remarked: "Nothing is easier than spending the public money. It does not appear to belong to anybody. The temptation is overwhelming to bestow it on somebody." *Quoted in CONGRESSIONAL RESEARCH SERVICE DICTIONARY, supra* note 1, at 155. Finally, Will Rogers quipped: "Lord, the money we do spend on Government and it's not one bit better than the government we got for one-third the money twenty years ago." *Quoted in CONGRESSIONAL RESEARCH SERVICE DICTIONARY, supra* note 1, at 156.

16. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994, § 6 (providing for the creation of a fund) (codified at IND. CODE § 13-7-16-6.5 (Supp. 1994)) & 15 (providing directions on permit fee appropriations) (uncodified).

revenues from reverting to the general fund if they are not spent during a fiscal year. Currently the permit fees go into another dedicated fund, the environmental management special fund, which has more sources of funds (e.g. fines) and more uses.¹⁷ The establishment of the new dedicated fund for environmental permit fees is an astute action by the General Assembly since “[i]t focuses attention on the accountability of the fund for the use [for which] it was collected.”¹⁸ A potential problem, however, embedded in the dynamics of the environmental management special fund, is the appearance of impropriety that arises when “environmental fines [are] be used to pay operating expenses for the IDEM enforcement personnel who both define the violations and set the level of the fines.”¹⁹ But, given the authority of the newly-constituted Environmental Quality Service Council to explore all major facets of IDEM’s operations on an ongoing basis,²⁰ this conflict of interest will probably be checked.

Arguably, SEA 417’s shifting of fee-making authority for NPDES, solid waste, and hazardous waste permits from the various environmental boards established under current Indiana law²¹ to the General Assembly constitutes an unwise exercise in environmental

17. Memorandum from Bill Beranek, President, Indiana Environmental Institute, Inc. to Institute Sponsors 1 (Feb. 11, 1994) (copy on file with author) [hereinafter Beranek Memorandum].

18. *Id.*

19. *Id.* See IND. CODE § 13-7-16-16.5(b) (Supp. 1994) (“The fund consists of fees and delinquent charges collected under IC 13-7-16.1.”).

20. See *infra* notes 94-103 and accompanying text. Cf. IND. CODE 13-7-16-6.5(e) (1993) (“The auditor of state shall make a report on the fund every four (4) months. . . . The auditor of state shall forward copies of the report to the following: (1) [t]he commissioner[;] (2) [t]he standing committees of the house of representatives and the senate concerned with the environment[;] (3) [t]he environmental study committee[;] (4) [t]he state budget committee[;] (5) [t]he environmental quality service council.”).

21. MARCIA J. ODDI, INDIANA ENVIRONMENTAL LAW HANDBOOK 1-6 (1994 ed.) [hereinafter INDIANA ENVIRONMENTAL LAW HANDBOOK].

At the same time [IDEM] was established by state statute in 1985, the Indiana [General Assembly] also created three environmental boards, the water pollution control board, the air pollution control board and the solid waste management board. These new boards replaced the then-existing stream pollution, air pollution and environmental management boards.

These three environmental boards are charged by law with promulgating the rules which [IDEM] is to enforce, and with hearing the appeals of those affected by the department’s actions. In other words, these three boards possess both legislative (through rulemaking) and judicial (through adjudicatory) authority in the state environmental arena, while [IDEM] exercises the executive authority.

Id.

The state environmental boards impacted by Senate Enrolled Act No. 417 are the water pollution control board (with authority over NPDES permits) and the solid waste management board (with authority over solid waste and hazardous waste permits). Since the establishment of the three key media environmental regulatory boards in 1985, a plethora of other state environmental boards have also been created by the Indiana General Assembly. Examples of these miscellaneous state environmental boards include the following: the Hazardous Waste Facility Site Approval Authority (the Authority’s executive council is charged by IND. CODE § 13-7-8.6-3(b) (1993) with promulgating rules regarding the operation of the Authority and regarding siting criteria); Pollution Prevention Board (charged by IND. CODE § 13-9-2-1 to -14 (Supp. 1994) with identifying problems

policy micro-management by the legislature.²² However, given the past level of distrust

and opportunities regarding industrial pollution prevention and working with IDEM and the Indiana Pollution Prevention and Safe Materials Institute on Pollution Prevention Policy); and, the Underground Storage Tank Financial Assurance Board (created by IND. CODE § 13-7-20-35 (1993 & Supp. 1994) to oversee the underground storage tank excess liability fund, to make rules regarding the fund, and to hear appeals from denial by IDEM of request for payments from the fund).

22. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 7 (codified at IND. CODE § 13-7-16.1 (Supp. 1994)). The level of detail in the statute pertaining to specific permit fees is astounding. For example, annual NPDES industrial permits, "other than coal mine permits or stone quarry permits" are assessed as follows:

The annual base fee per facility is one thousand dollars (\$1,000) for a major permit and four hundred dollars (\$400) for a minor permit plus the following annual discharge flow fee per facility:

Daily Average Actual Flow in MGD [millions of gallons per day].	Fee
.001-.05	\$200
.051-.1	\$300
.101-.2	\$700
.201-.3	\$1,000
.301-.5	\$1,400
.501-1.0	\$1,800
1.001-2.0	\$3,000
2.001-5.0	\$4,500
5.001-10.0	\$7,000
10.001-15.0	\$10,000
15.001-30.0	\$14,000
30.001-50.0	\$19,000
50.001-100.0	\$24,000
> 100.0	\$29,000

Annual flow fees are reduced by twenty percent (20%) for discharges that are comprised of greater than ninety percent (90%) of non-contact cooling water.

Id.

By way of further illustration of the level of detail in the statute, "new permit or major modification" solid waste permit application fees are established as follows:

	<u>Fee</u>
Sanitary Landfill	\$31,300
Construction\Demolition Site	\$20,000
Restricted Waste Site	
Type I	\$31,300
Type II	\$31,300
Type III	\$20,000
Processing Facility	
Transfer Station	\$12,150
Other	\$12,150
Incinerator	\$28,650
Waste Tire Storage	
Registration	\$500

regarding these permit fees between industries, municipalities, and IDEM in the months leading up to the Second Regular Session of the 108th General Assembly, as a practical matter it was probably necessary for the legislature to set the fees itself, while brokering a compromise between the various competing interest groups.²³ Moreover, it appears reasonably likely that the Environmental Quality Service Council²⁴ will be able to adduce information from IDEM and the various state environmental boards about the appropriateness and desirability of future permit fee modifications. In the next five years, or so, however—after the General Assembly has the opportunity to receive input from its novel Environmental Rulemaking Study Committee²⁵—it might be wise public policy to return the permit-setting authority to the state environmental boards, or a unified rulemaking environmental board fashioned by the legislature.

A major economic issue arising from the legislatively established environmental permit fees is whether “[t]he aggregate fee increase for small facilities, combining completely new fees in hazardous and solid waste with increases in wastewater fees on top of an anticipated increase in air permit fees could pose an unacceptable new burden to some small businesses.”²⁶ Moreover, a significant political issue regarding the use by IDEM of its enhanced funding is that if it “does not act quickly and effectively to use its new legislated fees to develop and fill full-time staff positions in the appropriate areas, the administration and the 1995 General Assembly will soon find the environmental management permit operation fund to contain a very large dedicated fund surplus and will cut the general fund contribution for the subsequent biennium.”²⁷ Since administrative agencies are typically hobbled by a variety of legal and practical obstacles that get in the way of the agency’s taking quick and effective action on any problem, IDEM should plan now to lavishly communicate its staffing advances and setbacks to the Environmental Quality Service Council so that a reasoned explanation of IDEM’s progress and difficulties in translating increased funding to increased agency personnel can be proffered to the General Assembly in time for their next biennium budget review.²⁸

B. Enhanced IDEM Permitting Responsibilities

As a partial quid pro quo for increasing IDEM’s funding,²⁹ SEA 417—in nine and a half turgid pages of mechanistic prose reminiscent of tax regulations, security rules and

Waste Tire Processing	\$200
Waste Tire Transportation	\$25

Id.

23. See generally Beranek Memorandum, *supra* note 17, at 2 (discussing negotiated adjustments in the agency-established fee schedules).

24. See *infra* notes 95-104 and accompanying text.

25. See *infra* notes 88-94 and accompanying text.

26. Beranek Memorandum, *supra* note 17, at 3.

27. Beranek Memorandum, *supra* note 17, at 3.

28. According to Dr. Beranek, “[w]e must also understand the difficulty the agency [staff persons] have to create new positions, recruit and train the staff and do it all with legislative scrutiny.” Beranek Memorandum, *supra* note 17, at 3.

29. See *supra* notes 13-28 and accompanying text.

RCRA's hammer provisions³⁰—sets forth numerous specific deadlines and requirements for IDEM review and action on various state environmental permits.³¹ The legislation creates, on the one hand, a sweeping general rule mandating IDEM approval or denial of permit applications. Seven time frames for agency action on various environmental permit applications are established by the statute:³² 365 days,³³ 270 days,³⁴

30. *See generally* Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992K (1988 & Supp. 1993) (setting forth legislatively imposed deadlines for EPA to promulgate rules regulating various aspects of hazardous wastes and imposing legislative solutions if the EPA missed the deadlines).

31. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 4 (codified at IND. CODE § 13-7-10.1 (Supp. 1994)).

32. IND. CODE § 13-7-10.1-5 (Supp. 1994). For purposes of calculating the time period for IDEM action on environmental permits, the time:

- (1) begins on the earlier of the date:
 - (A) an application and any required fee is received and stamped received by the department; or
 - (B) marked by the department on a certified mail return receipt accompanying an application and any required fee; and
- (2) ends on the date a decision is issued to approve or deny the application

Id.

33. The 365-day period—the most time allowed IDEM under the statute—is reserved for the following applications: “[a] new hazardous waste or solid waste landfill”; “[a] new hazardous waste or solid waste incinerator”; “[a] major modification of a solid waste landfill”; “[a] major modification of a solid waste incinerator”; “[a] new hazardous waste treatment or storage facility”; “[a] new Part B permit issued under 40 CFR 270 *et. seq.* for an existing hazardous waste treatment or storage facility”; and “[a] Class 3 modification under 40 CFR 270.42 to a hazardous waste landfill.” IND. CODE § 13-7-10.1-4(a)(2) (1993). For purposes of the permit accountability statute, “major modification” is a phrase-of-art applicable to solid waste permits only. The phrase refers to:

[a]ny change in a permitted solid waste facility that would:

- (1) increase the facility’s permitted capacity to process or dispose of solid waste by the lesser of:
 - (A) more than ten percent (10%); or
 - (B) five hundred thousand (500,000) cubic yards; or
- (2) change the permitted footprint of the landfill by more than one (1) acre.

IND. CODE § 13-7-10.1-2 (Supp. 1994). *Query:* What is a “footprint” of a landfill?

34. The 270-day deadline for IDEM permit processing pertains to the following two types of permit applications: “[a] Class 3 modification under 40 CFR 270.42 of a hazardous waste treatment or storage facility”; and “[a] major new National Pollutant Discharge Elimination System permit.” IND. CODE § 13-7-10.1-4(a)(2) (1993).

The legislative draftsmanship of the language “[a] major new National Pollutant Discharge Elimination System permit” in § 4 of Senate Enrolled Act No. 417 is deficient. No definition of the term is contained therein. *But see* § 7 of the Act—addressing permit fees—where, for purposes of § 7, “major permit” is defined as “a NPDES permit”:

- (1) as classified by the Region V Regional Administrator of the [USEPA] and the commissioner; and
- (2) as set forth in the Major Dischargers List developed by the [USEPA] and the department in

180 days,³⁵ 120 days,³⁶ 90 days,³⁷ 60 days,³⁸ and an administratively set period of time for certain air permits.³⁹ On the other hand, the Act allows for a variety of time stretch-outs,⁴⁰ time changes by rule,⁴¹ time changes by agreement,⁴² and time suspensions.⁴³

the "National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Indiana and EPA Region V" dated July 22, 1977.

Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 7 (codified at IND. CODE § 13-7-16.1 (Supp. 1994). *Query:* Is "[a] major new National Pollutant Discharge Elimination System permit" in § 4 of the Act equivalent to a "major permit" in § 7 of the Act? If not, what is the basis for the distinction? What effect would there be on IDEM's permit processing time mandates under the statute in the event of a statutory ambiguity? Presumably IDEM might consider adopting a rule under IND. CODE § 4-22-2 (1993 & Supp. 1994) that "changes a period of time" prescribed in § 4 of the Act, since a significant statutory ambiguity would probably constitute "some other significant factor concerning a class of applications [that] makes it infeasible for the commissioner to approve or deny the application within the period of time." *Id.* § 4 (codified at IND. CODE § 13-7-10.1 (1993 & Supp. 1994)).

35. The 180-day mandate for IDEM to process environmental permits addresses the following classifications of applications: "[a] new solid waste processing or recycling facility"; "[a] minor new National Pollutant Discharge Elimination System permit"; and "[a] permit concerning the land application of wastewater." IND. CODE § 13-7-10.1-4(a)(3) (1993). *Query:* What is "[a] minor new National Pollutant Discharge Elimination System permit" under the statute?

36. The 120-day deadline for IDEM to handle environmental permits focuses on two types of applications: "[a] Class 2 modification under 40 CFR 270.42 to a hazardous waste facility;" and "[a] wastewater facility or water facility construction permit." IND. CODE § 13-7-10.1-4(a)(4) (Supp. 1994).

37. The 90-day mandate for IDEM to process environmental permits addresses a single type of application "concerning a minor modification to a solid waste landfill or incinerator permit." IND. CODE § 13-7-10.1-4(a)(5) (Supp. 1994).

38. The 60-day deadline—the shortest specific time period deadline in the legislation—for IDEM action regarding an application for a permit addresses the following:

- (A) A Class 1 modification under 40 CFR 270.42 requiring prior written approval, to a hazardous waste:
 - (i) landfill;
 - (ii) incinerator;
 - (iii) treatment facility; or
 - (iv) storage facility.
- (B) Certification of a special waste.
- (C) Any other permit not specifically described in this subsection for which the application fee exceeds one hundred dollars (\$100) and for which a time frame has not been established under subsection (c) [dealing with "a new requirement concerning a class of applications that makes it infeasible . . . to approve or deny [the permit within] the period of time."].

IND. CODE § 13-7-10.1-4(a)(7) (Supp. 1994).

39. The legislation incorporates by reference "[t]he amount of time provided for in rules adopted by the air pollution control board" for various types of air permits. IND. CODE § 13-7-10.1-4(a)(6) (1993).

40. IND. CODE § 13-7-10.1-4(b) (Supp. 1994) (providing for a 30-day extension of time period, which may be made by IDEM if a public hearing is held, but which is inapplicable to some permit applications).

41. IND. CODE § 13-7-10.1-4(c) (Supp. 1994). This subsection provides that:

A [state environmental] board may, after consulting with the environmental study committee

An innovative feature of the Act is the allowance of IDEM and a permit applicant to agree "to have a consultant review an application" at the applicant's expense to facilitate the expedited processing of the permit.⁴⁴ This provision is sensible and flexible and—by privatizing some of IDEM's initial review responsibilities—holds promise for achieving a level of public cost savings in reviewing environmental permits. By keeping ultimate review authority with IDEM, it is not likely that private interests will be able to subvert public environmental standards; consultants will still be accountable to IDEM.

The complex options spelled out in the Act in the event that IDEM does not issue or deny an environmental permit within the aforementioned specific time frames⁴⁵ are unnecessarily complicated and counterproductive. The statute states, in general terms:

After reaching an agreement with . . . [IDEM] or after consulting with . . . [IDEM] for thirty (30) days and failing to reach an agreement, the applicant may choose to proceed under one (1) of the following alternatives [if the commissioner does not issue or deny a permit within the time specified]:

established [in this legislation], adopt a rule under IC 4-22-2 that changes a period of time described [in the general provisions of the statute] within which the commissioner must approve or deny an application:

- (1) if:
 - (A) the general assembly enacts a statute;
 - (B) a board adopts a rule; or
 - (C) a federal statute or regulation;

that imposes a new requirement concerning a class of applications that makes it infeasible for the commissioner to approve or deny the application within the period of time;
 - (2) if:
 - (A) the general assembly enacts a statute;
 - (B) a board adopts a rule; or
 - (C) a federal statute or regulation;

that establishes a new permit program for which a period of time is not described under subsection (a); or
 - (3) if some other significant factor concerning a class of applications makes it infeasible for the commissioner to approve or deny the application within the period of time.
- If a board adopts an emergency rule under this subsection, the time period described [in the general rule] is suspended during the emergency rulemaking process.

Id.

42. IND. CODE § 13-7-10.1-6(a) (Supp. 1994) (mandating that the agreement between IDEM commissioner and applicant be in writing).

43. *Id.* § 13-7-10.1-7(b). This subsection delineates an assortment of potential exigencies that may give rise to time suspension, including incomplete applications, request by the applicant for withdrawal or deferral of processing, the need to submit a permit application to the USEPA for review by state officials, and emergency rulemaking by a state environmental board to revise a processing time period.

44. *Id.* § 13-7-10.1-6.

45. See *supra* notes 32-43 and accompanying text.

- (1) The:
 - (A) applicant may request and receive a refund of a permit application fee paid by the applicant; and
 - (B) commissioner shall do the following:
 - (i) Continue to review the application.
 - (ii) Approve or deny the application as soon as practicable.
 - (iii) Refund the applicant's application fee within twenty-five (25) working days after the receipt of the applicant's request.
- (2) The:
 - (A) applicant may:
 - (i) Request and receive a refund of a permit application fee paid by the applicant; and
 - (ii) submit to the department a draft permit and any required supporting technical justification for the permit; and
 - (B) commissioner shall do the following:
 - (i) Review the draft permit.
 - (ii) Approve, with or without revision, or deny the draft permit in accordance with Section 10 of this chapter.
 - (iii) Refund the applicant's application fee within twenty-five (25) working days after the receipt of the applicant's request.
- (3) The:
 - (A) applicant may require that the department use the permit application fee and any additional money needed to hire an outside consultant to prepare a draft permit and any required supporting technical justification for the permit; and
 - (B) commissioner shall review the draft permit and approve, with or without revision, or deny the draft permit in accordance with Section 10 of this chapter.

If additional money is needed to hire an outside consultant under this subdivision, the applicant shall pay the additional money needed to hire the outside consultant.⁴⁶

A variety of specific exceptions, qualifications, and provisos to the general rule of alternative permit processing, however, create ambiguities and uncertainties in the meaning of the enactment.⁴⁷ It would be ironic, indeed, if the prolix statutory

46. IND. CODE § 13-7-10.1-8(a) (Supp. 1994).

47. See, e.g., *id.* § 13-7-10.1-8(b) ("Notwithstanding [the general rule,] an applicant may not receive a refund of a permit application fee if the permit application concerned the renewal of a permit."); IND. CODE § 13-7-10.1-8(c) (1993) ("The applicant may not proceed under [one of the provisions of the general rule] if the commissioner determines that a qualified consultant is not available. The commissioner's determination under this subsection is subject to appeal and review under [administrative review standards of Indiana law]."); *Id.* § 13-7-10.1-8(d) ("The applicant may not proceed under any of the [alternative] options [for permit processing] if construction or operation of the equipment or facility described in the permit application has already begun, unless construction or operation before obtaining the permit is authorized by a board rule or state statute.").

Senate Enrolled Act No. 417 creates a body of arcane rules focusing on the use and limitations of

rules—designed to expedite and facilitate environmental permit processing in Indiana—served to create barriers to more efficient and effective administrative review of permit applications.

An overarching administrative accountability measure under the Act regarding IDEM's newly defined permitting responsibilities, is the requirement that IDEM submit

consultants in the permit-expediting process. Illustrative language of these rules is as follows:

If an applicant chooses to proceed under [one of the alternative permit application procedures authorized, IDEM] shall:

- (1) select a consultant that has the appropriate background to review the applicant's application; and
- (2) authorize the consultant to begin work;

within fifteen (15) working days after the department receives notice that the applicant has chosen to proceed under [this alternative provision]. The commissioner may consult with the applicant regarding the advisability of proceeding under this section and may document such communications.

Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 4 (codified at IND. CODE § 13-7-10.1-9 (Supp. 1994)).

Under another prolix provision dealing with the use of consultants in alternative permitting situations, the legislation provides as follows:

If an applicant chooses to proceed under [an alternative permit processing procedure authorized under this statute], the applicant or a consultant shall prepare and submit to the commissioner the draft permit and required supporting technical justification for the permit within thirty-five (35) working days after:

- (1) the applicant has notified the commissioner that the applicant has chosen to proceed under [this alternative section]; or
- (2) the department has authorized a consultant to begin work under [an alternative provision of this law].

(b) The commissioner shall do the following:

- (1) Approve, with or without revision, or deny the draft permit within twenty-five (25) working days after receiving the draft permit. If the notice of opportunity for public comment or public hearing is required under applicable law before a permit decision can be issued, the commissioner shall comply with all public participation requirements

(c) If an applicant has elected to have a draft permit prepared under [one of the alternative permit processing provisions of the statute] and:

- (1) the consultant fails to submit a draft permit and supporting technical justification to the commissioner; or
- (2) the commissioner fails to approve or deny the draft permit;

within the applicable time specified . . . the department shall refund the applicant's permit application fee within twenty-five (25) working days after expiration of the applicable time period.

Id. (codified at IND. CODE § 13-7-10.1-10 (Supp. 1994)). Moreover, IND. CODE § 13-7-10.1-13 (Supp. 1994) indicates that a disgruntled permit applicant can always take his complaint to court for judicial review of IDEM's action: "The remedies provided in this chapter are not the exclusive remedies available to a permit applicant. A permit applicant's election of a remedy under this chapter does not preclude the permit applicant from seeking other remedies available at law or in equity."

an annual report "that contains an evaluation of the actions taken by the department to improve the department's process of issuing permits."⁴⁸ Embedded in the Act's annual report requirements are a number of specific informational mandates designed to force IDEM to make the most efficient and effective use of its new funding. Thus, IDEM's annual permit processing report must contain the following: (1) "[a] description of a reduction or increase in the backlog of permit applications in each . . . permit program during the preceding twelve (12) month period"; (2) the amount of permit fees collected and expenditures made from fee revenue; (3) analysis of reasons for the increase or decrease in operating costs for each permit program and inspection program; (4) a review of the actions taken by IDEM to improve the permit and inspection programs; (5) the time spent by IDEM in conducting appeal hearings and objection hearings under administration law principles; (6) the number of suspension notices issued by IDEM; (7) the operational goals of IDEM for the next year; and (8) a "permit status report" discussion that includes information regarding "[t]he facility name and type of each permit application pending on January 1 of the previous year, and the date each application was filed with the department," action taken on each application by the end of the previous year, and other miscellaneous permit information.⁴⁹

On balance, SEA 417's provisions regarding enhanced IDEM permitting responsibilities go too far in legislating the minutiae of administrative procedure and operation of environmental programs. While IDEM is bound to generate a plethora of interesting and useful policy data regarding its permit and enforcing functions under Indiana and federal environmental laws, key players in the new, legislatively invented permitting game (including IDEM personnel, permit applicants, private permit consultants, members of the public, and the courts) are likely to experience considerable confusion and uncertainty with the details of the statute.

C. Confidentiality of Voluntary Environmental Audits

SEA 417 contains a separate set of provisions addressing "environmental audits" and a new privilege for an "environmental audit report."⁵⁰ The definition of "environmental audit" under the statute is

a voluntary, an internal, and a comprehensive evaluation of:

- (1) A facility or an activity at a facility regulated under:
 - (A) [Indiana Code] 13;
 - (B) a rule or standard adopted under [Indiana Code] 13;

48. IND. CODE § 13-7-10.1-12(a) (Supp. 1994). This report must be submitted to the following: (1) the governor; (2) the General Assembly; (3) the state environmental boards; and (4) the environmental study committee. *Id.* For a brief review of IDEM's efforts through September 1994 in improving and trying to improve its permitting operations, see Tim Method, *IDE� Seeks Input on Improved Permit Service*, IND. ENVTL. BRIEFS, Sept. 1994 (INDIANA ENVIRONMENTAL BRIEFS is a newsletter published by Environmental Quality Control, Inc., Indianapolis, Ind.).

49. IND. CODE § 13-7-10.1-12 (Supp. 1994).

50. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 8 (codified at IND. CODE §§ 13-10-3-1 to -12 (Supp. 1994)).

- (C) any determination, permit, or order made or issued by the commissioner of the department of environmental management under [Indiana Code] 13; or
 - (D) federal law; or
- (2) management systems related to a facility or an activity; that is designed to identify and prevent noncompliance with laws and improved compliance with laws and is conducted by an owner or operator of a facility or an activity by an employee of the owner or operator or by an independent contractor.⁵¹

The definition of "environmental audit report" under the statute is a set of documents prepared as a result of an environmental audit and labeled "Environmental Audit Report; Privileged Document" that

- (1) includes field notes, records of observations, findings, opinions, suggestions, conclusions, drafts, memoranda, drawings, photographs, computer generated or electronically recorded information, maps, charts, graphs, and surveys collected or developed for the primary purpose of preparing an environmental audit; and
- (2) includes, when completed, the following three (3) components:
 - (A) An audit report prepared by the auditor that includes:
 - (i) the scope of the audit;
 - (ii) the information gained in the audit;
 - (iii) conclusions and recommendations; and
 - (iv) exhibits and appendices.
 - (B) Memoranda and documents analyzing a portion of or all of the audit report and discussing implementation issues.
 - (C) An implementation plan that addresses correcting past noncompliance, improving current compliance, and preventing future noncompliance.⁵²

The general privilege created by the statute provides that, with certain enumerated exceptions,⁵³ "an environmental audit report is privileged and is not admissible as evidence in a civil, a criminal, or an administrative legal action including enforcement actions under [Indiana Code] 13-7-11."⁵⁴ Two key, mutually exclusive exceptions to the privileged status are: (1) material scrutinized in a civil or administrative proceeding which, after *in camera* judicial study, is found to be subject to disclosure;⁵⁵ and (2)

51. IND. CODE § 13-10-3-1 (Supp. 1994).

52. *Id.* § 13-10-3-2.

53. See *infra* notes 55-62 and accompanying text.

54. IND. CODE § 13-10-3-3 (Supp. 1994).

55. *Id.* § 13-10-3-4(a). The specific language of this exception is as follows:

In a civil or an administrative proceeding, a court of record, after an *in camera* review, shall require disclosure of material for which the privilege described . . . is asserted, if the court determines that both subdivisions (1) and (2) apply:

(1) The environmental audit report was first issued after July 1, 1994.

material scrutinized in a criminal proceeding which, after *in camera* judicial review, is found to be subject to disclosure.⁵⁶ Consistent with usual practice, the party asserting the “environmental audit report privilege” has the “burden of proving that the party may exercise the privilege.”⁵⁷

Other provisions of the legislation address the following specific issues: the ability of a prosecutor to obtain an otherwise privileged environmental audit report when the prosecutor can demonstrate that he or she has obtained information “from a source independent of an environmental audit report” and “has probable cause to believe” that an environmental crime has been committed,⁵⁸ the severability of non-privileged parts of an environmental audit report from the privileged parts of the report,⁵⁹ conditions for

- (2) One of the following apply:
 - (A) The privilege is asserted for a fraudulent purpose.
 - (B) The material is not subject to the privilege.
 - (C) The material is subject to the privilege and the material shows evidence of noncompliance with:
 - (i) this title or a rule or standard adopted by one (1) of the boards;
 - (ii) a determination, permit, or order issued by the commissioner under this title; or
 - (iii) the federal, regional or local counterpart of items (i) or (ii); andthe person claiming the privilege did not promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence.

Id.

56. *Id.* § 13-10-3-4(b). The specific language of this exemption is as follows:

If the noncompliance described in subsection (a)(2)(C) constitutes a failure to obtain a required permit, the person is deemed to have made appropriate efforts to achieve compliance if the person filed an application for the required permit not later than ninety (90) days after the date the person became aware of the noncompliance.

Id. See also *id.* § 13-10-3-11 (creating provisos to the inapplicability of the environmental audit report privilege regarding documents and information required to be maintained and reported according to state or federal law and regarding data and information obtained by a state agency by observation or from an independent source); *infra* note 57 and accompanying text (discussing exception for prosecutors in criminal matters who can establish that they obtained initial information from a source independent of the environmental audit report).

57. *Id.* § 13-10-3-6. Unique burden of proof provisions exist for special circumstances. First, if “the evidence indicates that the person [attempting to assert the privilege] was in noncompliance” of relevant environmental standards, then the proponent of the privilege has the burden of showing that he or she “made appropriate efforts to achieve compliance,” as described in *id.* §§ 13-10-3-4(b), -5(b).

Second, if the party seeking disclosure of material in an environmental audit report asserts that the privilege is “being asserted for a fraudulent purpose,” the party seeking disclosure has “the burden of proving that the privilege is being asserted for a fraudulent purpose.” *Id.* § 13-10-3-6(c).

Finally, in a criminal proceeding, a prosecutor seeking disclosure of material in an environmental audit report that is relevant to the commission of an environmental offense, under *id.* § 13-10-3-5(a)(2)(D), has the “burden of proving the conditions for disclosure.” *Id.* § 13-10-3-6(d).

58. *Id.* § 13-10-3-7.

59. *Id.* § 13-10-3-8.

waiver and non-waiver of the environmental audit report privilege,⁶⁰ rights of the parties to stipulate the applicability or non-applicability of the environmental audit report privilege,⁶¹ and retention and separate applicability of "the work product doctrine and the attorney client privilege."⁶²

An exhaustive analysis of Indiana's new environmental audit report privilege is beyond the scope of this Article and is worthy of a separate law review article or student note. Suffice it to say that some first-order rhetorical questions raised by the statute establishing the environmental audit report privilege are as follows. First, is the narrow definition of "environmental audit report," coupled with a relatively stringent allocation of the burden of proof to the person seeking to exercise the privilege,⁶³ likely to create judicial hesitancy in recognizing the exercise of the privilege? Second, assuming the eventual favorable reception by the state judiciary of the Indiana environmental audit report privilege report, is this privilege really a trap for the unwary, in light of the prospect for parallel federal environmental enforcement proceedings and the ability of federal courts to independently resolve questions of privilege according to "principles of the common law as they may be interpreted by the *courts of the United States* in the light of reason and experience"?⁶⁴ Third, since a wide assortment of environmental information is presently subject to mandatory disclosure and reporting requirements,⁶⁵ is it not likely

60. IND. CODE § 13-10-3-9 (1993).

61. *Id.* § 13-10-3-10.

62. *Id.* § 13-10-3-12.

63. *See supra* note 57 and accompanying text.

64. FED. R. EVID. 501 (emphasis added). At the present time, federal environmental enforcement officials seem to take an approach that is arguably hostile to the concept of an environmental audit report privilege. As explained in a recent article:

[T]he [federal] government's primarily enforcement- and punishment-oriented approach undercuts the putative incentives to compliance provided by [other federal policies seeking to encourage companies to voluntarily undertake environmental compliance auditing]. In the case of EPA's audit policy, the failure to provide any real assurance that EPA would not seek to use a company's voluntary audit reports in an enforcement action against the company or protect audit results from disclosure to other private parties—audit reports would provide road maps to the violations at issue—stimulated a number of thoughtful commentators to counsel companies against undertaking voluntary audits. Similarly, the government's refusal to assure that it would respect claims of attorney/client privilege or work product as to audit results, as well as the significant potential that voluntary disclosure could be used against a company in enforcement have undoubtedly undercut the inclination of companies to voluntarily disclose environmental offenses under the Justice Department policy.

Kevin A. Gaynor & Thomas R. Bartman, *Here's the Stick, But Where's the Carrot?: The Latest Draft Environmental Sentencing Guidelines' Severity Vitiates Their Compliance Incentives*, in 1 AMERICAN BAR ASSOCIATION, SECTION ON NATURAL RESOURCES, ENERGY AND ENVIRONMENTAL LAW, SECOND FALL MEETING (Sept.-Oct. 1994) at Tab 6-13 to 14 [hereinafter 1994 SONREEL MATERIALS] (citing Environmental Auditing Policy Statement, 51 Fed. Reg. 25004-25010 (1986) & UNITED STATES DEPARTMENT OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTION VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (June 3, 1991)).

65. *See generally* Robert F. Blomquist, *Information Disclosure and Access*, in ENVIRONMENTAL LAW

the prosecutor's exception to the environmental audit report privilege⁶⁶ will tend to swallow the privilege—at least with regard to criminal prosecutions?

D. IDEM's Voluntary Compliance Program Mandate

"Within the last several years, the states have begun to experiment with 'voluntary' [environmental compliance] programs that depend on private initiative and minimal or greatly reduced government oversight."⁶⁷ State experimentation with voluntary compliance programs has been stimulated by government's realization of the lack of public resources to fully "remediate or even pursue by enforcement" actions at major problem sites throughout the country.⁶⁸ Moreover, "the private marketplace for property and business acquisitions and financing increasingly demands assurances that properties meet governmental standards, and that the governmental agency has 'signed off' in some way that will cut-off or minimize future liabilities."⁶⁹

During 1993, the Indiana General Assembly and the Governor passed into law SEA 394 which, among other things, created the alternative of new voluntary cleanup provisions to ensure compliance.⁷⁰ During 1994, in an evolutionary expansion of voluntary environmental compliance concepts, the General Assembly and the Governor enacted SEA 417, which added a "voluntary compliance program" to IDEM's environmental responsibilities under state law.⁷¹

SEA 417 creates an Office of Voluntary Compliance within IDEM to enable businesses and municipalities subject to state environmental regulation to attain compliance, while promoting cooperation and technical assistance between IDEM and regulated entities. The technical and compliance assistance initiative established by the Act mandates an assortment of programmatic ends and means, including the following new IDEM responsibilities: establishment of an "ombudsman to the regulated community to assist . . . with specific regulatory or permit matters"; provision of "assistance to new and existing businesses and small municipalities in identifying applicable environmental

PRACTICE GUIDE § 4 (M. Gerrard ed., 1992); Robert F. Blomquist, *The Logic and Limits of Public Information Mandates Under Federal Hazardous Waste Law: A Policy Analysis*, 14 VT. L. REV. 559 (1990).

66. See *supra* note 57 and accompanying text.

67. Michael L. Rodburg, *State Voluntary Cleanup Programs* in 2 1994 SONREEL MATERIALS, *supra* note 64, at Tab. 2.

68. Rodburg, *supra* note 67.

69. Rodburg, *supra* note 67.

70. Ind. S. Enrolled Act No. 394, Pub. L. No. 160-1993 (codified at IND. CODE §§ 13-7-8.5-7, 13-7-8.9-24 & 13-7-10-1.5) (Supp. 1994)). Under this 1993 statute, a party must submit a \$1,000 fee and an application, which describes a site's physical characteristics, operational history, nature of contamination, and potential for human exposure. *Id.* §§ 13-7-8.9-7, -8. Upon acceptance of the application, the party is required to undertake an investigation and to propose a voluntary remediation work plan. *Id.* § 13-7-8.9-12. IDEM then reviews and evaluates the work plan and may approve, modify and approve, or reject it. *Id.* § 13-7-8.9-14, -15. Prior to approval of a voluntary response action plan under the statute, a party must enter a voluntary remediation agreement, which spells out the terms of evaluation and implementation of the work plan. The agreement must include, *inter alia*, a cost estimate and schedule for IDEM review. IND. CODE § 13-7-8.9-13 (1993).

71. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 8 (codified at IND. CODE §§ 13-10-1-1 to 13-10-4-3 (Supp. 1994)).

regulations [and] permit requirements"; and development and distribution of educational materials regarding "environmental requirements," "compliance methods," pollution prevention techniques, "voluntary environmental audits," and "pollution control technologies . . . including standardized forms and procedures for completing permit applications."⁷² To ensure that these mandates are carried out, the legislation requires IDEM to prepare yet another annual report of its activities—in this instance, the program's performance.⁷³

In an ambiguous set of concluding provisions regarding the voluntary compliance program, the Act states that "[i]nquiries made to the program by regulated entities and responses to regulated entities by employees of the program are *confidential*,"⁷⁴ yet IDEM "may contract with another entity to provide some or all of the [voluntary compliance] services"⁷⁵ required by the legislation. In light of the juxtaposition and similarity of these provisions with the "voluntary environmental audit" provisions of the Act,⁷⁶ it is probable that courts will eventually be faced with the vexing interpretational problem of whether the "confidential" status of "inquiries made to the program by regulated entities"⁷⁷ may constitute a separate evidentiary privilege under Indiana law, a potential expansion of the environmental audit report privilege contained elsewhere in the Act,⁷⁸ or be deemed not to be an evidentiary privilege at all. Assuming that the independent confidentiality provision of "inquiries made to the program by regulated entities"⁷⁹ is recognized to provide some evidential privilege, a subsidiary interpretational question also arises: May a party achieve a safe harbor from future potential civil or criminal environmental actions by extensively reporting information and making inquiries to IDEM's voluntary compliance program? In this regard, unless the statutory language addressing voluntary compliance inquiries is deemed by the judiciary to be an independent evidentiary privilege,⁸⁰ the exceptions and limitations contained in the environmental audit report privilege section of the statute would prevent an unreasonably expansive interpretation of the theoretically available voluntary compliance disclosure privilege.⁸¹

72. IND. CODE § 13-10-2-2 (Supp. 1994).

73. *Id.* § 13-10-2-3.

74. *Id.* § 13-10-2-4 (emphasis added) ("Information concerning inquiries made to the program . . . may not be made available for use by other divisions of the department without the consent of the regulated entity that made the inquiry and received the response.").

75. *Id.* § 13-10-2-5.

76. *See supra* notes 50-66 and accompanying text.

77. *See supra* notes 74-75 and accompanying text.

78. *See supra* notes 50-66 and accompanying text.

79. *See supra* notes 74-75 and accompanying text.

80. *See supra* notes 77-78 and accompanying text.

81. *See supra* notes 55-66 and accompanying text. The problem of ambiguity regarding the confidentiality language in Ind. S. Enrolled Act No. 417 is not resolved by the confusing amendment to this language brought about by Indiana House Enrolled Act No. 1182 § 27, Pub. L. No. 82-1994 § 27 (codified at IND. CODE § 13-10-2-4 (Supp. 1994)), which amends the language of Ind. S. Enrolled Act 417 to read as follows:

Inquiries made to the program by regulated entities and responses to regulated entities by employees of the program are confidential. Information concerning inquiries made to the program

E. Air Pollution Amnesty

SEA 417 creates amnesty conditions, with limited maximum penalties, for firms not in compliance with air permit requirements. Statutory amnesty, however, is not available to sources that never obtained an operating permit and that have the potential to emit one hundred tons or more per year of a covered pollutant for which the state Air Pollution Control Board had established permit requirements prior to January 1, 1994.⁸² To qualify for amnesty, all of the following conditions must be met by the applicant: (1) a complete application for either a Title V operating permit, a Federally Enforceable State Operating Permit (FESOP), or an enforceable operating agreement, which must be submitted no later than March 16, 1996; (2) specific identification of each facility and source for which amnesty is claimed; (3) construction or modification of the emitting facility or source prior to the amnesty cutoff date of January 1, 1994; and (4) qualification for amnesty consideration by not having been the subject of a completed administrative or civil action during the five-year period between January 1, 1989 and January 1, 1994 for the applicant's failure to obtain necessary air construction or operating permits, or the subject of a pending administrative or civil action.⁸³

Assuming an applicant is successful in satisfying the aforementioned criteria, the Act sets a single civil penalty of \$3000 per application with respect to a Title V operating permit and a single civil penalty of \$2000 per FESOP application.⁸⁴ In both cases, the air pollution amnesty applicant must also pay the relevant annual operation fees for all of its unpermitted facilities for the years of noncompliance.⁸⁵ The air pollution amnesty is limited in scope: The cap on liability merely applies to judicial or administrative enforcement actions for failure to obtain required air permits or registrations. The amnesty cap does not limit or excuse the following: criminal liability; violation of health or technology-based standards; prevention of significant deterioration or new source construction permit violations; state enforcement seeking to abate conditions alleged to present an "imminent and substantial endangerment to health or welfare," or to present an "unreasonable and emergency risk to the health and safety" of citizens; or private civil tort suits.⁸⁶

Given the circumscribed reach of the air pollution amnesty provisions of SEA 417 and the incentive created by the legislation for unpermitted sources to seek proper approval for air emissions (with modest financial penalties inuring to the benefit of the state), this legislative mechanism constitutes good public policy. Amnesty provisions

by regulated entities and responses to regulated entities by employees of the program may not be made available for use by other divisions of the department without the consent of the regulated entity that made the inquiry and received the response.

IND. CODE § 13-10-2-4 (Supp. 1994) (emphasis added).

82. Ind. S. Enrolled Act No. 417 § 8, Pub. L. No. 16-1994 (codified at IND. CODE § 13-10-4-1 to -3 (Supp. 1994)).

83. IND. CODE § 13-10-4-1(c) (Supp. 1994).

84. *Id.* § 13-10-4-1(g).

85. *Id.*

86. *Id.* § 13-10-4-1(d).

with penalty caps, after all, are simply market-based regulatory alternatives to traditional command and control environmental laws.⁸⁷

F. Environmental Rulemaking Study Committee

SEA 417 establishes a twenty-one-member Environmental Rulemaking Study Committee—consisting of four members from the Senate, four members from the House of Representatives, the IDEM Commissioner, and twelve other individuals representing local government, environmental organizations, business, and agricultural interests.⁸⁸ The Rulemaking Study Committee is charged in the legislation with studying and evaluating issues regarding “the organization and rulemaking procedures” of the three principal state environmental regulatory boards: the Air Pollution Control Board, the Solid Waste Management Board, and the Water Pollution Control Board.⁸⁹ A specific, and somewhat surprising, legislative request for evaluation in the statute is a directive to the Rulemaking Study Committee to consider “the feasibility of replacing” the three principal environmental regulatory boards with “two (2) independent boards that concern: (A) rulemaking and development of environmental policy; and (B) adjudicatory matters related to environmental law.”⁹⁰

The Rulemaking Study Committee held its inaugural meeting in July, with follow-up meetings scheduled for August 1994.⁹¹ Specific policy issues that emerged at this meeting included concerns that: (1) the structure of the environmental boards may have become obsolete and unable to keep pace with the need to issue a multiplicity of rules followed up by more enforcement and adjudicatory hearings; (2) political considerations often displace sound science in board deliberations; (3) the environmental boards require more accountability for efficient and effective operations; (4) conflict of interest provisions for environmental board members need to be strengthened; (5) the boards need their own independent staff; and, (6) proxy voting by board members should not be allowed.⁹²

87. See generally ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 345-77 (3d. ed. 1991).

88. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 13 (uncodified).

89. *Id.* § 13(f)(1).

90. *Id.* § 13(f)(2). Interestingly, it appears that the policy idea of two state environmental boards—one with unified responsibility over all environmental rulemaking, the other with unified adjudicatory responsibility over all appeals from environmental administrative decisions—originated with the 1992 deliberations of the Governor’s Operations Committee—Environmental Cluster Study. See generally *Short History of IDEM, MEDIATOR*, July-Aug. 1994, at 2 (MEDIATOR is a newsletter published by the Indiana Environmental Institute, Inc., Indianapolis, Ind.). See also INDIANA GOVERNMENT OPERATIONS COMMITTEE, ENVIRONMENTAL CLUSTER DRAFT REPORT ¶ A(4) (March 22, 1992).

91. *Environmental Rulemaking Study Committee First Meeting*, IND. ENVTL. BRIEFS, Aug. 1994, at 2 (INDIANA ENVIRONMENTAL BRIEFS is a newsletter published by Environmental Quality Control, Inc., Indianapolis, Ind.).

92. Dr. William Beranek, Jr., President of the Indiana Environmental Institute, Inc., has written a thoughtful and detailed critique of what he refers to as state “citizen boards” in the establishment and implementation of environmental law and policy in Indiana. See William Beranek, Jr., *Thoughts to Improve Indiana Rulemaking*, MEDIATOR, July-Aug. 1994, at 2-3. See also *supra* note 90. This brief article, worthy of extensive quotation, argues as follows:

The Indiana legislature's Environmental Rulemaking Committee has an important opportunity to correct serious barriers to fair rulemaking by the current Board structure.

I believe that the citizen board as presently constituted to oversee environmental policy in Indiana no longer works. In the 1990's, understanding the basics of most of the complex environmental laws, regulations and policies is beyond what can be expected of or is achieved by most citizen Board members for most issues.

Increasingly, the Indiana citizen environmental board itself adds little substantive input to the public environmental policy debate.

Board decisions are made by gut instinct, by special interest lobbying or, most often, by advice of the technical staff of IDEM as consistent with an official administration position formulated offstage (either deep in the bureaucracy or high in politically-sensitive echelons).

The original purpose of the boards—to guarantee enhanced public involvement in the regulatory process—is not occurring.

Most of Indiana environmental regulations are essentially passed-through from the federal government; it is the few that originate from the General Assembly, IDEM staff or citizen petition as new rule[s] or additions to the federal for which the Indiana rulemaking procedures need improvements.

....
The environmental boards are hampered by:

1. *No staff of their own.* The Boards are often asked to decide on technical matters on a disagreement between a public and the IDEM staff without the benefit of a technical staff of their own serving strictly the interest of each Board member in the manner that the Legislative Service Agency staff serves legislative committees.
2. *No attorney of its own.* The Boards make legally delicate decisions procedurally and substantively without advice from their own independent lawyer serving them without conflict. Usually, the lawyers giving them advice are the IDEM Office of Legal Counsel or the Attorney General, both of which could be representing parties with different interests.
3. *No single hearing officer for rulemaking.* The two public hearings for rulemaking now occur before the entire Board, once at the Board meeting at which the preliminary adoption vote is scheduled to occur and the second at the Board meeting at which the final adoption decision is scheduled to occur. Gone is expectation of a single Board hearing officer to hear and assimilate formal public comments at hearings throughout the state months prior to final Board deliberations; all Board members serving as hearing officers on complex topics (and then deciding within hours on the rule language) will mean none serve effectively in that capacity. Any assimilation of public comments is now at the discretion of the IDEM staff in private and public meetings of their choosing.
4. *Ex-Officio agency heads represented as voting members.* The Department of Health, Lieutenant Governor and Department of Natural Resources have ex-officio representation on each board. That they are present is good for interagency communication. That they vote is bad for true policy discussion. For any politically controversial decision, there is pressure for them to become a caucus vote for the position of their sister agency or of the Governor's office. This inhibits difficult calls from being discussed openly and being decided on their merits. Together with point one, this puts all power in the Governor's office when it wants and in the agency staff hands when it does not. Politics is important. My preference is that the General Assembly be the spot where politics decides policy. The Boards and the agency

According to one report, the Rulemaking Study Committee held a "final meeting" and voted unanimously to recommend two key legislative proposals to the 1995 General Assembly: (1) that Administrative Law Judges who propose decisions to the state environmental boards on appeals from orders by the IDEM Commissioner be retained but removed from IDEM employment, as is currently the case, and (2) that "a new environmental appellate panel comprised of three attorneys appointed by the governor be established to hear appeals of Administrative Law Judges' decisions."⁹³ Apparently, the Rulemaking Study Committee will recommend the functional equivalent of an independent and unified state adjudicatory board to hear appeals from IDEM permitting enforcement decisions; however, it appears to have concluded, by default, that a unified rulemaking and policymaking state environmental board—with jurisdiction over air, water, and solid waste matters—is not advisable at the present time.

professionals should execute that policy free of politics.

5. *No requirement for public hearing weeks or months in advance of final board decision.* The rulemaking procedures recently adopted by the General Assembly eliminate the requirement for public hearings after preliminary adoption and well before the Board meeting for final adoption. This was the place where all parties could hear what each other is saying to the state and respond later in writing. [Hearings] were required in different parts of the state, for the convenience of the public. Any public meetings now are purely at the discretion of the agency. There will be a tendency for the parties to talk directly with the agency in private. The only time sides will hear each other's final arguments directly could be in the mandated public hearing in the hours before the Board makes its final decision. This procedure does not foster informed discussion.

USEPA does not use citizen boards in its rulemaking, but uses professional staff dedicated for years at a time, internal agency checks and balances, a thorough, open public hearing process, high quality special interest involvement [from] all sides throughout the process, and external legal and procedural oversight such as provided by Office of Management and Budget.

Id.

93. *Environmental Rulemaking May be Changing for Indiana*, IND. ENVTL. BRIEFS, Nov. 1994, at 3. See *supra* note 91. Under current Indiana law, the IDEM Commissioner has jurisdiction to issue an enforcement order dealing with air, water, and solid and hazardous waste programs administered by IDEM. Unless the notice provides otherwise (or is styled as an emergency order), the enforcement order takes effect 20 days after the alleged violator receives it unless the order is appealed. IND. CODE § 13-7-11-2(d) (Supp. 1994).

An order or final decision of the IDEM Commissioner under *id.* § 13-7-11-5 may be appealed to the relevant state environmental board for an administrative hearing. *Id.* § 4-21.5. The administrative appellant must request a review of the order "before the twentieth day after receiving the notice by filing a written request with the [IDEM] Commissioner." *Id.* § 13-7-11-2(d).

The administrative appeal proceeds with the IDEM Commissioner appointing an administrative law judge to conduct the review proceedings on behalf of the relevant board under IND. CODE § 4-21.5. While the administrative law judge makes a recommended decision, the relevant board is the "ultimate authority" in the administrative appeal process under IND. CODE § 4-21.5. A final order or determination of one of the state environmental boards, however, is subject to judicial review by the intermediate appellate court. See IND. CODE §§ 4-21.5-5; 13-7-11-2(g) (Supp. 1994).

Since the legislative process often works at a slow and incremental pace, it is probably unrealistic to expect major reform of both adjudicatory and rulemaking functions of the state environmental boards during the 1995 General Assembly. However, given the increasing complexity of state environmental policy, coupled with the growing importance of fair and efficient administration of environmental law to Indiana's continued economic prosperity, it is imperative that state lawmakers engage in "a comprehensive and serious public debate"⁹⁴ of both adjudicatory and rulemaking reform within the next few years.

G. Environmental Quality Service Council

The General Assembly complemented its formation of the Rulemaking Study Committee⁹⁵ by establishing a similarly configured, twenty-one member Environmental Quality Service Council—with typical diverse representation—in SEA 417.⁹⁶ Yet, in terms of political importance, the legislative creation of the latter study group—with a charge to help improve the quality of IDEM performance—was an order of magnitude greater than the former study group, since the latter group was charged with responsibility for examining the structure of citizen boards in state environmental law and policy. Indeed, from the standpoint of industry, the emergence of the Environmental Quality Service Council was an essential quid pro quo for increased public funding of IDEM operations. Importantly:

The Council was established in controversy. The idea was promoted by those in industry who wanted an assurance that the higher annual permit fees they were being asked to pay would be used to provide a higher level of service from IDEM. . . . Another group in the regulated community promoted the idea of a study committee because they believed that perhaps even more resources might be needed in the future to bring the agency to an adequate level of professionalism; this group believed that justification for such an increase in fees or tax revenues would demand rigorous, credible, independent proof that it was absolutely needed.

In opposition originally were the environmentalist community and the IDEM administration who were fearful that the study committee would interfere with and, at worst, intentionally weaken IDEM operations.⁹⁷

94. Beranek, *supra* note 92, at 3.

95. See *supra* notes 88-94 and accompanying text. A third legislatively created environmental study committee—the Environmental Management Evaluation Committee—played a more subdued role during 1994. That Committee submitted its report in May 1994. The report described staffing and funding for the major IDEM permit areas along with an estimate of permit backlogs. The report also provided a description of funding of state and federal hazardous substance cleanup and remediation activities for Indiana. See *Indiana General Assembly Studies IDEM*, MEDIATOR, July-Aug. 1994, at 1. See also *supra* note 90.

96. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 14 (uncodified).

97. *Environmental Quality Service Council*, MEDIATOR, July-Aug. 1994, at 1. See also *supra* note 90. Spurred, perhaps, by so much political attention, IDEM restructured its operations in July, 1994. Under this restructuring, two new Deputy Commissioner positions were administratively created and staffed: a Deputy Commissioner for Public Policy and Planning and a Deputy Commissioner for Administration. These two new

Ostensibly, the legislature expects the Council to achieve great things by the time the Council files its "final report" by November 1, 1995.⁹⁸ The Council's final report must analyze and evaluate IDEM's progress, or lack of progress, in: (1) reviewing and issuing permits on a timely basis; (2) providing "consistency" in issuing permits "to avoid overregulation"; (3) achieving "[e]fficient and effective implementation of federal and state laws"; (4) attaining "[e]ffective technical assistance capability"; and (5) "[d]evelop[ing] . . . permittee assistance programs."⁹⁹ As part of the aforementioned analysis and evaluation, the Council must provide "[a] description of the systems used to evaluate" IDEM operations.¹⁰⁰ Presumably, this analytical constraint on the Council's report was inserted in the legislative package to protect IDEM from general and unsubstantiated criticisms by the Council. The Council, in turn, will be assisted in its information-gathering activities by a legislative directive to IDEM to report monthly to the Council regarding IDEM's permitting programs, proposed rulemakings, financial status, and "[a]ny additional matters requested by the [C]ouncil."¹⁰¹

The most important power delegated to the Council, however, transcends its role in reporting on the policy minutiae of IDEM operations. The Council's most important power is to report "[a]n estimate of *funding levels* required by [IDEM]."¹⁰² In justifying the appropriate recommended funding levels for IDEM, the Council will be able to exercise broad discretion under the Act in interpreting the ambiguous meaning of such broad statutory evaluative parameters as providing "consistency" in issuing permits "to avoid overregulation," achieving "[e]fficient and effective implementation of federal and state laws," and attaining "[e]ffective technical assistance capability."¹⁰³ To the extent that the Council's discretionary authority under SEA 417 is informed, fair, and balanced,

upper management positions at IDEM—reporting directly to the IDEM Commissioner—complement two preexisting deputy commissioner slots (a Deputy Commissioner for Environmental and Regulatory Affairs and a Deputy Commissioner for Enforcement and Legal Affairs), for a total of four deputy commissioners. During 1994, IDEM established an "Operational Planning Task Force"—with the advice of a consultant—to reorganize permitting functions and increase operational efficiency. During 1994, IDEM also worked with its consultant on reorganizing its air program and reviewed water and solid waste permitting programs. *See IDEM Restructures Management*, MEDIATOR, July-Aug. 1994, at 1. *See also supra* note 90.

98. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 14 (uncodified). *See generally* Kyle Niederpruem, *State Environmental Agency Will Soon be Looked at by New Oversight Board*, INDIANAPOLIS STAR, May 15, 1994, at B-1. Interestingly enough, the legislation establishing the Rulemaking Study Committee, discussed *supra* notes 88-94 and accompanying text, expired on December 31, 1994. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 13 (uncodified). Presumably, the General Assembly concluded that a longer study period was justified in the case of IDEM operations than with regard to the operations of the state environmental boards.

99. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994 § 14(j)(1) (uncodified).

100. *Id.* § 14(j)(4)(A).

101. *Id.* § 14(k)(4). One of the key strategic problems of the Council in performing its responsibilities will be to cope with "infoglut." *See, e.g., Environmental Quality Service Council's Inaugural Meeting*, IND. ENVTL. BRIEFS, Aug. 1994, at 2. (describing the plethora of reports and information transmitted by IDEM officials to Council).

102. Ind. S. Enrolled Act No. 417, Pub. L. No. 16-1994, § 14(j)(4)(B) (emphasis added).

103. *See supra* note 98 and accompanying text.

IDEML—in the company of the citizens of the State of Indiana—will benefit from more efficient and effective environmental protection efforts. To the extent, however, that the Council's exercise of its discretionary power is arbitrary and capricious, the citizens of Indiana will gain nothing and lose a golden opportunity to transform environmental law and policy to enhance, rather than detract from, continued economic prosperity.¹⁰⁴

II. MISCELLANEOUS INDIANA ENVIRONMENTAL AND NATURAL RESOURCES LEGISLATION, 1994

Besides enacting SEA 417, the bulk of environmental legislative action during the session,¹⁰⁵ Indiana's 1994 Second Regular Session of the 108th General Assembly enacted a miscellany of significant bills pertaining to the environment. These bills addressed the following six issues: (1) automobile emission testing improvements; (2) solid waste management district powers; (3) time limitations regarding IDEM administrative enforcement actions; (4) regulation of surface coal mining; (5) pollution prevention policy; and (6) mixing zones for discharges into Lake Michigan.¹⁰⁶

104. See generally Blomquist, *supra* note 6, at 1037 n.10 (discussing the low national rankings of Indiana regarding numerous measures of environmental quality and commitment with the implication of eventual long-term detrimental economic consequences from such failings).

105. See *supra* notes 11-104 and accompanying text.

106. Less important environmental and natural resources legislation, also passed during 1994 include: Ind. H. Enrolled Act No. 1038, Pub. L. No. 1-1994 (codified at various portions of IND. CODE (Supp. 1994)) (providing technical corrections regarding environmental law and other types of law in the Indiana Code); Ind. H. Enrolled Act No. 1213, Pub. L. No. 123-1994 (codified at various portions of IND. CODE (Supp. 1994)) (establishing, among other things, a Renewable Transportation Fuels Task Force to be appointed by the Governor to provide policy analysis and recommendations on developing ethanol and renewable transportation fuels in Indiana); Ind. H. Enrolled Act No. 1263, Pub. L. No. 88-1994 (codified at IND. CODE §§ 13-8-10-1; 13-8-15-2 (Supp. 1994)) (establishing criminal offenses for failure of an owner of an oil or gas well who ceases operations to properly plug and abandon the affected well; providing additional powers to Natural Resources Commission to unilaterally plug and abandon oil or gas wells and apply the owner's bond or other security for the remedial action); various portions of Ind. H. Enrolled Act No. 1182, Pub. L. No. 19-1994 (codified at IND. CODE §§ 13-1-1-3, -4, -26; 13-1-1.2-1; 13-7-5-2, -7, -8; 13-7-13-1; 13-7-23-10.3; 13-7-23-11, -20 (Supp. 1994)). The General Assembly Committee Report Synopsis for House Enrolled Act No. 1182 states:

[The Act] adopts language concerning conflicts of interest required by the [F]ederal Clean Air Act. Provides parameters for fee structures adopted by the air quality board. Permits public utilities to conduct open burning under certain circumstances. Permits the [IDEM Commissioner] to issue orders addressing multiple sites. . . . Changes the distribution of waste tire management fund. . . . Establishes the voluntary compliance fund, transfers money from the environmental management special fund to the voluntary compliance fund, and appropriates money in the voluntary compliance fund to the [IDEM]. Provides that [IDEM's] office of voluntary compliance operates the technical and compliance assistance program. . . . [and adds] non-Title V sources to the cap on civil penalties for failure to possess a permit registration. Provides that the environmental service quality counsel evaluate implementation of the voluntary compliance program.

INDIANA LEGISLATIVE COUNCIL, DIGEST OF ACTS 44 (1994). The General Assembly further passed Ind. S. Enrolled Act No. 307, Pub. L. No. 86-1994 (codified at IND. CODE §§ 13-3-3-6, -6.5, -22, -22.5; 13-3-4-4 (Supp.

A. Automobile Emission Testing Improvements

SEA 285¹⁰⁷ was passed to avoid the continuing problem of federal sanctions against Indiana under the Clean Air Act Amendments of 1990 for failure to have an adequate "enhanced" automobile emissions testing program for parts of the state deemed to be "serious" ozone pollution areas.¹⁰⁸ The legislation effects three policy changes that should enable Indiana to finally meet federal auto emissions testing mandates. First, instead of limiting implementation of the automobile inspection program to Indiana Vocational Technical College students under the direction of their instructors—as mandated by prior law—SEA 285 shifts supervision of the program to IDEM, while authorizing the agency

1994)) (providing the procedure for adding areas to existing state conservancy districts and requiring the state Natural Resources Commission to make determinations regarding whether the proposed district can be operated in a manner compatible with established regional water and sewer districts); Ind. H. Enrolled Act No. 1382, Pub. L. No. 56-1994 (codified, *inter alia*, at IND. CODE § 8-10-9 (Supp. 1994)) (a special piece of legislation establishing a "waterway management district" in "a city having a population of more than thirty-three thousand eight hundred fifty (33,850) but less than thirty-five thousand (35,000) persons in a county having a population of more than four hundred thousand (400,000) but less than seven hundred thousand (700,000) persons"); Ind. H. Enrolled Act No. 1398, § 11, Pub. L. No. 44-1994 (codified at IND. CODE § 36-7-29-1, -23 (Supp. 1994)) (establishing special legislation limited to "[a] city having a population of more than five thousand six hundred fifty (5,650) but less than five thousand seven hundred eight (5,708)" and "[a] county having a population of more than one hundred twenty-nine thousand five hundred (129,500) but less than one hundred thirty thousand six hundred (130,600)" to establish "local environmental response financing board[s]" and collect taxes to clean up hazardous substances).

107. Ind. S. Enrolled Act No. 285, Pub. L. No. 83-1994 (codified at IND. CODE §§ 13-1-1-11, -11.3, -12) (Supp. 1994)).

108. See 42 U.S.C. § 7511a(c)(3) (Supp. 1994). In December 1993, the USEPA indicated that it was considering imposing discretionary sanctions against Indiana because of the state's failure to provide a commitment for a vehicle inspection and maintenance program, as required by the Clean Air Act Amendments of 1990, for Clark, Floyd, Lake and Porter Counties—non-attainment areas for ozone. The potential EPA-imposed penalties under consideration in January 1994 included federal highway construction fund restrictions for the state. See EPA Notice of Proposed Sanctions, 59 Fed. Reg. 3544 (Jan. 24, 1994).

IDE M originally agreed to adopt the required I/M program by November 15, 1993. This commitment included an implementation schedule. Because the Indiana General Assembly adjourned on June 30, 1993, without taking action necessary to implement an enhanced I/M program, Indiana failed to meet these deadlines. According to its [January 1994] notice, EPA intend[ed] to impose sanctions, including loss of highway funding sanctions and a 2-for-1 growth offset in areas required to have a permit program under the new source review provisions of the [Clean Air Act Amendments], on May 15, 1994. The notice recognizes, however, that EPA would lift temporarily the highway and offset sanctions if the Indiana General Assembly passes, and the governor signs, legislation authorizing an enhanced I/M program consistent with the [Clean Air Act Amendments] requirements. The 1994 General Assembly enacted SEA 285 as part of an effort to avoid the sanctions described by the EPA in its notice.

Charlie Grandy, *Indiana Faces Clean Air Act Sanctions*, IND. ENVTL. COMPLIANCE UPDATE, March, 1994, at 5-6. See *supra* note 107.

to contract with other private firms to conduct the inspection program.¹⁰⁹ Second, the Act requires IDEM to annually advise the General Assembly's budget committee regarding the adequacy of the state and federal funding to implement a proper motor vehicle emissions testing program in the state.¹¹⁰ Third, SEA 285 directs IDEM to immediately notify the governor and the General Assembly's budget committee if aggregate state and federal funding "become insufficient to implement a motor vehicle emissions testing program."¹¹¹

B. Solid Waste Management District Modifications

SEA 239¹¹² makes three significant changes in solid waste planning and management law in Indiana.¹¹³ Initially, the statute mandates that a solid waste management district meet on an annual basis, "not later than September 15," for the purpose of "fix[ing] the budget, tax rate, and tax levy" of the district "for the ensuing . . . year."¹¹⁴ Moreover, any solid waste management fees promulgated by a district may be established only after public notice and hearing, while budgets of solid waste management districts must be sent to the executive and the fiscal body of each county and municipality within the district prior to adoption by the solid waste management board.¹¹⁵ SEA 239 introduces a second significant change in existing law by enhancing the powers of solid waste management districts in several specific ways. New provisions delineated in the statute include the power: (1) to run promotional and educational programs about solid waste and recycling; (2) to make grants or loans to promote composting and similar projects; (3) to engage in a small quantity hazardous waste generator collection and disposal project; and (4) to form a non-reverting capital fund, to which a maximum of five percent of the district's total annual budget may be transferred.¹¹⁶ Third, SEA 239 establishes a "Solid Waste Management Districts Study Commission," charged with studying a variety of questions regarding solid waste management policy. Among the policy issues that the Commission is expected to study and report on are the following: (1) the nature, methods, and relevance of the state's solid waste management goals and means utilized to reach those goals in light of the environmental and economic needs of the state; (2) a comparison of benefits and results of the private and public sectors in meeting Indiana's solid waste management goals; (3) the role of IDEM in achieving the state's solid waste management goals; and (4) methane production facilities and yard waste disposition questions.¹¹⁷

109. Ind. S. Enrolled Act No. 285, Pub. L. No. 83-1994 § 1 (codified at IND. CODE § 13-1-1-11 (Supp. 1994)).

110. *Id.* § 2(a) (codified at IND. CODE § 13-1-1-11.3(a) (Supp. 1994)).

111. *Id.* § 2(b) (codified at IND. CODE § 13-1-1-11.3(b) (Supp. 1994)).

112. Ind. S. Enrolled Act No. 239, Pub. L. No. 34-1994 (codified at IND. CODE §§ 6-1.1-17-3, -5, 13-9.5-2-11, -14, -2; 13-9.5-9-2 (Supp. 1994); certain provisions of act are uncodified).

113. For a history of solid waste planning, management and recycling legislation in Indiana, *see* Blomquist, *supra* note 6, at 1045 n.39.

114. Ind. S. Enrolled Act No. 239, Pub. L. No. 34-1994 § 2 (codified at IND. CODE § 6-1.1-17-5 (Supp. 1994)).

115. *Id.* §§ 1, 4 (codified at IND. CODE §§ 6-1.1-17-3; 13-9.5-2-14 (Supp. 1994)).

116. *Id.* § 3 (codified at IND. CODE § 13-9.5-2-11 (Supp. 1994)).

117. *Id.* § 7 (uncodified).

On balance, SEA 239 adds sophistication to existing solid waste management statutes by providing for a more nuanced level of detail regarding solid waste management district financial responsibilities and governmental powers. One wonders, however, about the limits of usefulness for the General Assembly's seemingly insatiable appetite for the creation of study commissions—like the Solid Waste Management Districts Study Commission—charged with a multitude of tasks and given unrealistically short timeframes to prepare relevant reports.¹¹⁸

C. Regulation of Underground Coal Mining

SEA 408 fills gaps in Indiana law by providing standards for dealing with environmental damage caused by underground coal mining operations.¹¹⁹ The key section in this new legislation mandates that for any underground coal mining operations conducted after June 30, 1994, the operator must “[p]romptly repair or compensate for material damage resulting from subsidence” damages to “occupied residential dwelling[s]” or “noncommercial building[s]”; moreover, the operator must “[p]romptly replace any drinking, domestic, or residential water supply from a well or spring that . . . has been affected by contamination, diminution, or interruption resulting from the mining operation.”¹²⁰ In addition, SEA 408 also modifies certain administrative procedures by the Indiana Department of Natural Resources (DNR) regarding suspension or revocation of coal mining permits and forfeiture of bonds.¹²¹

D. IDEM's Statute of Limitations

House Enrolled Act (HEA) 1182,¹²² among other things, specifies that for an IDEM administrative enforcement action to be timely, it must be commenced “not more than three (3) years after the date [IDEM] discovers the event or the last of a series of events that serves as the basis” for the enforcement action.¹²³ An enforcement action brought after the newly defined limitation period is void.

A special transition section of HEA 1182 addresses those cases where the “events” discovered by IDEM are discovered before July 1, 1994.¹²⁴ To prevent a gap in the statute of limitations—which might otherwise be interpreted to impose no limits on the commencement of IDEM administrative enforcement actions for events discovered pre-July 1, 1994—Section 31 of HEA 1182 provides that IDEM administrative enforcement actions for these earlier events must be commenced before July 1, 1997.¹²⁵

118. The Solid Waste Management Districts Study Commission was directed to file its report by December 1, 1994. *See id.*

119. Ind. S. Enrolled Act No. 408, Pub. L. No. 85-1994 (codified at IND. CODE §§ 13-2-22.2-16; 13-4.1-6-9; 13-4.1-9-2.5; 13-4.1-11-6 (Supp. 1994)).

120. *Id.* § 3 (codified at IND. CODE § 13-4.1-9-2.5 (Supp. 1994)).

121. *Id.* §§ 2, 4 (codified at IND. CODE §§ 13-4.1-6-9; 13-4.1-11-6 (Supp. 1994)).

122. Ind. H. Enrolled Act No. 1182, Pub. L. No. 82-1994 (codified at IND. CODE § 13-7-5-5 (Supp. 1994)).

123. *Id.* § 8.

124. *Id.* § 31 (uncodified).

125. *Id.*

The three-year statute of limitations period for IDEM's commencement of administrative enforcement actions is good public policy. The limitation period fashions a fair and consistent cutoff point regarding liability for, what would otherwise be, stale environmental infractions. Prior to the enactment of the new legislation, the limitation period was in doubt, and the judiciary was ultimately responsible for attempting to find an appropriate limitation period by implication. In addition, the administrative enforcement limitations period—imposing accountability for IDEM enforcement of environmental laws—dovetails with the newly imposed permit review and issuance accountability rules for IDEM.

E. Pollution Prevention Policy

Other sections of HEA 1182 seek to amplify and enhance pollution prevention policy in Indiana, while altering administrative details of solid waste reduction in the state.¹²⁶ Section 18 of the Act requires IDEM's Office of Pollution Prevention and Technical Assistance to provide technical assistance regarding source reduction and recycling, while overseeing the state recycling grants program.¹²⁷ With this new provision juxtaposed with earlier statutory directives to IDEM, the General Assembly has gone too far by intermingling industrial pollution prevention efforts by IDEM's Office of Pollution Prevention and Technical Assistance—typically calling for review of hazardous waste issues—with nonhazardous municipal solid waste efforts. Industrial pollution prevention policy and municipal solid waste policy are quite distinct problems. It may be unwise to mix these problems into a single IDEM office without ensuring that the office's programmatic needs for current responsibilities are fully met. Indeed, in the future, it may be appropriate for the General Assembly to direct IDEM to create separate administrative offices for industrial pollution prevention and for municipal solid waste reduction policy.

Section 19 of HEA 1182 requires the Indiana Pollution Prevention Board to explicitly assume various fiscal responsibilities.¹²⁸ Additional responsibilities now borne by the Board include its approval of the Indiana Pollution Prevention and Safe Materials Institute's proposed biennial budget request, preparation of budget forms to the State Budget Agency, and presentation of the Board's biennial budget request in public meetings concerning the budget.¹²⁹ In light of the increasing complexity and importance of state industrial pollution prevention law and policy,¹³⁰ these new fiscal accountability provisions should help the Board better manage pollution prevention programs and projects in the state.

126. *Id.* §§ 18, 19 (codified at IND. CODE §§ 13-9-2-5; 13-9-3-8 (Supp. 1994)). For an analysis and discussion of earlier legislation regarding pollution prevention policy in Indiana, see Blomquist, *supra* note 6, at 1049-54.

127. Ind. H. Enrolled Act No. 1182, Pub. L. No. 82-1994 (codified at IND. CODE § 13-9-2-5 (Supp. 1994)).

128. *Id.* § 19 (codified at IND. CODE § 13-9-3-8 (Supp. 1994)).

129. *Id.*

130. See generally Robert F. Blomquist, *Government's Role Regarding Industrial Pollution Prevention in the United States*, 29 GA. L. REV. 349 (1995).

F. Lake Michigan Discharges and Mixing Zones

In a controversial change to existing state water pollution control law, achieved by the lobbying efforts of Amoco so that its Whiting, Indiana refinery could become eligible for a mixing zone for its discharge into Lake Michigan,¹³¹ HEA 1126, among other things, instructs IDEM to allow for a "mixing zone" in water pollution permits involving discharges into Lake Michigan¹³² if the permittee "demonstrate[s] to [IDEM] that the mixing zone will not cause harm to human health or aquatic life."¹³³ As a precautionary measure under the Act, even when mixing zones are otherwise found to be permissible for discharges into Lake Michigan, "surface water quality standards for bioaccumulative chemicals of concern" must be applied by IDEM to the undiluted discharge rather than at a point outside the mixing zone.¹³⁴

While special interest environmental legislation is not unheard of in the annals of American environmental law and policy,¹³⁵ the idea of fashioning a legislative standard for the benefit of one entity is unsavory, at best. On balance, however, it is difficult to ascertain whether HEA 1126 really is special interest legislation or a mere concession to the greater dilutional capacity of Lake Michigan, in comparison with smaller bodies of water in Indiana. If premised on the latter assumption, joined with a strategic concern about an important industry to Indiana's economy, the action by the General Assembly in passing and the Governor in signing HEA 1126 is probably justified, assuming a more stringent federal technological standard would not apply and the dilutional allowance does not represent backsliding by Indiana of its water quality standards.

III. CASE LAW DEVELOPMENTS

During the 1994 Survey period, Indiana state courts and federal courts, addressing problems that arose within Indiana, issued a number of opinions on a variety of interesting

131. See, e.g., Marsha Hahney, *Valpo Senator Plans Fight to Repeal Controversial Pollutant-Leeway Law*, GARY POST-TRIB., Nov. 10, 1994, at B7 (describing the statute as "special legislation of the worst kind," according to Senator William Alexa); Stevenson Swanson & Bonnie Miller Rubin, *Amoco Refinery Seeking a Pass on Salt Dumping*, CHI. TRIB., April 13, 1994, at B1 (discussing discontent among environmentalists regarding mixing zone allowance for Amoco).

132. Ind. H. Enrolled Act No. 1126, Pub. L. No. 84-1994 (codified at IND. CODE §§ 13-1-3-20; 13-1-3-21 (Supp. 1994)).

133. *Id.* § 1(a) (codified at IND. CODE § 13-1-3-20(a) (Supp. 1994)).

134. *Id.* § 1(b) (codified at IND. CODE § 13-1-3-20(b) (Supp. 1994)). The legislation also directs IDEM, when issuing permits authorizing mixing of discharges, to "allow for mixing initiated by the use of submerged, high rate diffuser outfall structures or the functional equivalent" thereto. *Id.* § 2(b) (codified at IND. CODE § 13-1-3-21(b) (Supp. 1994)).

135. See, e.g., CASES AND MATERIALS ON ENVIRONMENTAL LAW, *supra* note 87, at 281-82 n.1 (describing how Congress passed "special case" legislation in response to federal court opinions that upheld an administrative interpretation that the Clean Water Act did not allow the EPA to vary the technology-based effluent limitations solely because water quality would not be measurably improved by compliance; explaining that Congress enacted legislation exempting two paper mill plants in California, but no other plants, from the pH and BOD requirements).

environmental and natural resources issues. Five significant published opinions—three state and two federal—are worthy of further comment.¹³⁶

A. State Opinions

In *Natural Resources Commission v. Amax Coal Co.*,¹³⁷ the Indiana Supreme Court decided an important state administrative law decision that upheld the power of the DNR to regulate surface coal mine operators' use of ground water as an aspect of the Department's statutory authority to control surface coal mining.¹³⁸ In consolidated cases, the Indiana Supreme Court, in a 3-2 opinion, reversed and vacated a decision by the Court of Appeals, Fourth District,¹³⁹ which had upheld the Marion Superior Court's orders holding that the DNR was precluded from conditioning the issuance of coal companies' strip mining permits upon demonstration that dewatering plans would not harm adjacent landowners.¹⁴⁰

At the outset of its *Amax Coal* opinion, the Supreme Court observed that the question presented for appellate review was whether the DNR possessed the statutory authority, pursuant to the Indiana Surface Mining Control and Reclamation Act (I-SMCRA),¹⁴¹ "to place restrictions upon mining companies when pumping ground water from beneath property in which those companies have property rights."¹⁴² In resolving the question, the

136. Other "honorable mention" decisions decided during 1994 by state and federal courts include the following: *United States v. Bethlehem Steel Corp.*, 38 F.3d 862 (7th Cir. 1994) (affirming district court's finding that Bethlehem violated RCRA and SDWA by failing to comply with the corrective action conditions required by two UIC permits for its underground injection wells; however, reversing and vacating the portion of the district court opinion that granted partial summary judgment and injunctive relief against Bethlehem regarding Bethlehem's F006 hazardous waste since the sludges in Bethlehem's lagoons and landfills were not subject to RCRA Subtitle C requirements as a listed hazardous waste); *United States v. SCA Svcs. of Ind.*, 849 F. Supp. 1264 (N.D. Ind. 1994) (holding that cost recovery claimant who had performed cleanup efforts at waste disposal site could proceed under another section of CERCLA allowing recovery of response costs); *United States v. Wedzeb Enter. Inc.*, 844 F. Supp. 1328 (S.D. Ind. 1994) (holding that (1) district court had original jurisdiction over controversy arising under CERCLA; (2) capacitors containing PCBs that were sold by defendants to broker for resale were not waste, as required for liability; and (3) event that caused release of PCBs into environment was not disposal that defendants arranged for, but unanticipated fire); and *Auburn Foundry, Inc. v. State Bd. of Tax Comm'r's*, 628 N.E.2d 1260 (Tax Ct. Ind. 1994) (holding that taxpayer, a foundry, appealing a decision of the State Board of Tax Commissioners which had reduced property tax deduction granted to the taxpayer for resource recovery system by IDEM was without statutory authority to overrule the decision by IDEM granting property tax deduction under the statute).

137. 638 N.E.2d 418 (Ind. 1994).

138. *Id.* at 431.

139. 603 N.E.2d 1349 (Ind. Ct. App. 1993).

140. *Amax Coal Co.*, 638 N.E.2d at 420-22.

141. IND. CODE § 13-4.1-1-2 (1990). The court linked I-SMCRA with the federal Surface Mining Control and Reclamation Act of 1977 (F-SMCRA), 30 U.S.C. §§ 1201-1328 (1988 & Supp. 1993). According to the Supreme Court of Indiana, both the state and federal statutes "recogniz[e] the need to protect society and the environment, as well as to assure the rights of surface landowners and others, by preventing and minimizing the adverse effects of surface mining operations." *Amax Coal Co.*, 638 N.E.2d at 419.

142. *Amax Coal Co.*, 638 N.E.2d at 423.

Indiana Supreme Court first examined the express provisions of I-SMCRA that “directly apply to water resources protection and the prevention of offsite damage.”¹⁴³

The Indiana Supreme Court discerned a number of pertinent statutory provisions, in this regard, which included, among others, the following: a surface coal mining permit application requirement that the applicant demonstrate “the probable hydrologic consequences of [its] surface coal mining and reclamation operation, both on and off the mine site”;¹⁴⁴ a permit application requirement that a coal mine operator submit a detailed reclamation plan demonstrating measures that will “assure the protection of . . . the quality of surface and ground water systems, both onsite and offsite, from adverse effects of the mining and reclamation process,” while showing that “the rights of present users to that water” will be protected;¹⁴⁵ a statutorily-imposed “burden upon an applicant . . . to establish the existence of certain conditions . . . aimed at preserving the hydrologic balance in the area surrounding that being mined;”¹⁴⁶ and legislative empowerment of the DNR to halt coal mining operations in the face of “imminent danger to the health or safety of the public,” amplified by the power to impose additional “affirmative obligations on the operator.”¹⁴⁷ Moreover, the Indiana Supreme Court concluded that these specific statutory powers were supplemented by DNR’s “promulgat[ion] [of] many regulations, through the administrative rulemaking process, to aid in enforcing the statutes.”¹⁴⁸ Accordingly, the Indiana Supreme Court held that the DNR was acting within its statutory authority when ordering the coal mining operators to meet protective conditions as a prerequisite to receiving agency approval of the operators’ permit revision applications.¹⁴⁹

The Indiana Supreme Court next undertook a second level of inquiry in *Amax Coal*—beyond the express statutory provisions authorizing the DNR to place various restrictions on coal mining operations under state statute—in order to ascertain whether “I-SMCRA expressly preserves the common law water rights system that existed when I-SMCRA became effective.”¹⁵⁰ Rejecting the coal mining companies’ argument that a 1983 state court decision,¹⁵¹ coupled with a statutory reservation of rights provision,¹⁵² established a doctrine of absolute use of ground water in Indiana, the Indiana Supreme Court reasoned that recent state statutory and administrative changes had undercut that 1983 precedent.¹⁵³ The culmination of the opinion was the Indiana Supreme Court’s response to the coal operators’ Takings Clause argument under the Fifth Amendment to

143. *Id.* at 424.

144. *Id.* (quoting IND. CODE § 13-4.1-3-3(a)(11) (Supp. 1993)).

145. *Id.* (quoting IND. CODE § 13-4.1-3-4(a) (Supp. 1993)).

146. *Id.* (citing IND. CODE §§ 13-4.1-4-3(a); 13-4.1-8-1 (Supp. 1993)).

147. *Id.* at 426 (quoting IND. CODE § 13-4.1-11-5 (1990)).

148. *Id.*

149. *Id.* at 427.

150. *Id.*

151. Wiggins v. Brazil Coal and Clay Corp., 452 N.E.2d 958 (Ind. 1983).

152. IND. CODE § 13-4.1-8-1(25) (Supp. 1993). The statute states: “Nothing in this article shall be construed as affecting in any way the right of any person to enforce or protect under applicable law the person’s interest in water resources affected by a surface coal mining operation.” *Id.*

153. *Amax Coal Co.*, 638 N.E.2d at 428.

the United States Constitution.¹⁵⁴ Finding that imposing regulatory controls on ground water, which can be potentially harmed by surface coal mining operations, was “a legitimate exercise of the police power,”¹⁵⁵ the crux of the constitutional issue—as analyzed in the opinion—boiled down to whether the Indiana statutory scheme, as it affected ground water rights, went too far and, therefore, constituted a “regulatory taking.”¹⁵⁶ Relying on a constitutional test emanating from the United States Supreme Court’s opinion in *Nollan v. California Coastal Commission*,¹⁵⁷ the Indiana Supreme Court reasoned that “a land use regulation will not effect a taking if it substantially advances a legitimate state interest and does not deprive an owner of economically viable use of his property.”¹⁵⁸ Applying this test to the facts, the *Amax Coal* Court reiterated its view that DNR’s actions were in full compliance with the purposes of I-SMCRA and went on to conclude that the ground water conditions on the coal mining permits were intended by the State to prevent potential serious offsite damage.¹⁵⁹ Therefore, the court found no regulatory taking had occurred.¹⁶⁰

The reasoning in *Amax Coal* is incomplete because the opinion fails to cite—let alone discuss—the 1992 landmark decision by the United States Supreme Court in *Lucas v. South Carolina Coastal Council*.¹⁶¹ Importantly, the *Lucas* Court asserted an aggressive anti-regulatory approach to Takings jurisprudence by holding that “[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”¹⁶² A proviso to this rule, however, is the existence of “background principles of nuisance and property law” that made the proposed land use “always unlawful.”¹⁶³ While the omission of a *Lucas* analysis in *Amax Coal* is problematic, it appears to be a harmless judicial error by the Indiana Supreme Court since extant Indiana nuisance precedent would seem to afford ample “background principles” to limit ground water use to protect offsite property.

154. U.S. CONST. amend. V.

155. *Amax Coal Co.*, 638 N.E.2d at 430.

156. *Id.*

157. 483 U.S. 825, 834 (1987).

158. *Amax Coal Co.*, 638 N.E.2d at 430 (citing *DNR v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000 (Ind. 1989) (citing *Nollan*, 483 U.S. at 834)).

159. *Id.*

160. *Id.* at 430-31. Justice Givan issued a one-sentence dissent, urging that “[t]he trial court and the Court of Appeals were correct.” *Id.* at 430. Justice Dickson dissented without opinion. *Id.*

161. 112 S. Ct. 2886 (1992).

162. *Id.* at 2899.

163. *Id.* at 2900-01.

owners,¹⁶⁴ even assuming, arguendo, that the coal operators could be said to have enjoyed extensive property title rights to the subterranean ground water.

In *Wright Motors, Inc. v. Marathon Oil Co.*,¹⁶⁵ the Indiana Court of Appeals, First District, issued a significant opinion interpreting the extent of a contractual release "from all liability for environmental contamination."¹⁶⁶ Marathon Oil Company ("Marathon") had operated a gasoline service station for many years on property it leased from Wright Motors, Inc. ("Wright Motors") under a ground lease.¹⁶⁷ In 1976, Wright Motors consented to Marathon's assignment of the lease to Green Construction of Indiana, Inc. ("Green Construction"). In the Assignment Agreement—signed by all three parties—Wright Motors also agreed to release Marathon from any liability under the terms of the lease from December 19, 1979 forward.¹⁶⁸ One week after signing the Assignment Agreement, Marathon sold its underground storage tanks, previously installed on the property, to Green Construction.¹⁶⁹

After Marathon's assignment to Green Construction, the underground storage tanks beneath the service station were discovered to have leaked petroleum hydrocarbons into the surrounding soils.¹⁷⁰ After incurring more than \$80,000 in remediation costs to clean up the contamination, Wright then brought a contribution action for those costs against Marathon and Green Construction pursuant to the Indiana Underground Storage Tanks Act¹⁷¹ and common law theories of contribution and waste.¹⁷² At the trial court level, Marathon moved for summary judgment, claiming that when Wright Motors consented to Marathon's assignment of its lease to a third party, Wright Motors also released Marathon from all liability under the lease, including liability for environmental contamination.¹⁷³ The trial court agreed with Marathon's motion and entered summary judgment in Marathon's favor.¹⁷⁴ On appeal, the court of appeals reversed, relying

164. See, e.g., *Central Ind. Ry. v. Mikesell*, 221 N.E.2d 192 (Ind. App. 1966) (holding that evidence sustained finding that plaintiff's property damages resulted from sudden release of the great volume of surface water backed up behind railroad's embankment, and not from the water itself); *Northern Ind. Pub. Serv. Co. v. W.J. & M.S. Vesey*, 200 N.E. 620 (Ind. 1936) (holding that the owner of greenhouses was entitled to recover all damages due to continuous operation of gas plant emitting poisonous fumes, where the court found that the plant could not be so operated as not to emit fumes and it would be of less damage than to permit them to enjoin operation of the plant).

165. 631 N.E.2d 923 (Ind. Ct. App. 1994).

166. *Id.* at 927.

167. *Id.* at 924.

168. *Id.* at 925. Paragraph 4 of the Agreement provided: "Landlord expressly agrees that Assignor shall have *no further liability of any nature whatsoever under the terms of the Lease* from and after December 19, 1979, the expiration of the primary term thereunder." *Id.*

169. *Id.* at 924.

170. *Id.*

171. IND. CODE § 13-7-20-21 (Supp. 1994).

172. *Wright Motors, Inc.*, 631 N.E.2d at 924-25.

173. *Id.* at 924.

174. *Id.*

principally on the contractual release phrase "under the terms of the Lease" as "expressly qualif[ying] the extent of the liability released to liability under the lease terms."¹⁷⁵

The *Wright Motors* court declined to accept Marathon's "broad interpretation of the release," or its assertion that a federal district court opinion construing similar language in another agreement was dispositive.¹⁷⁶ Distinguishing the release language in the federal case, *Rodenbeck v. Marathon Petroleum Co.*,¹⁷⁷ the Indiana Court of Appeals noted that release language at issue in the federal case had broadly released "claims and obligations of any character or nature whatsoever arising out of or in connection with said agreements," while the release language in the case at bar demonstrated "that the release was merely a release of contractual obligations under the lease."¹⁷⁸ Since the Indiana General Assembly provided for a statutory cause of action for contribution against Marathon as a past owner or operator of a leaking underground storage tank,¹⁷⁹ and since under common law "the owner or a person with an interest in real property may bring an action for waste for the destruction, misuse, alteration or neglect of the premises by one lawfully in possession of the premises,"¹⁸⁰ as a matter of law, Marathon was not released from all liability for environmental contamination.¹⁸¹ Accordingly, summary judgment in favor of Marathon by the trial court was deemed to be in error.¹⁸²

Wright Motors is an important case in the developing environmental transactional law of Indiana.¹⁸³ The decision is faithful to diverse sources of law that may impact on a property transaction, including contract law, statutory law, and common law tort principles. The lesson of the case, and other analogous cases, is that transactional lawyers should pay close attention to the precise language used in transactional documents to effectuate the true intent of their clients and to protect their clients' interests.

In *Great Lakes Chemical Corp. v. International Surplus Lines Insurance Co.*,¹⁸⁴ the Indiana Court of Appeals, Fourth District, had the occasion to grapple with a vexing interpretational question at the intersection of insurance law and environmental law.¹⁸⁵ Great Lakes Chemical Corporation ("Great Lakes") brought an action seeking a declaratory judgment that International Surplus Lines Insurance Company (ISLIC) and

175. *Id.* at 925 (emphasis added).

176. *Id.* at 926.

177. 742 F. Supp. 1448 (N.D. Ind. 1990).

178. *Wright Motors, Inc.*, 631 N.E.2d at 926.

179. *Id.* at 927 (citing IND. CODE § 13-7-20-21(b) (Supp. 1994)).

180. *Id.* at n.3 (citations omitted).

181. *Id.* at 927.

182. *Id.*

183. See generally GREAT LAKES ENVIRONMENTAL TRANSACTIONS GUIDE, *supra* note 10.

184. 638 N.E.2d 847 (Ind. App. Ct. 1994).

185. The Indiana Supreme Court has agreed to grant a transfer petition in *Indiana v. Kiger d/b/a Kiger's Sunoco* (Ind. No. 32505-9409-CV-836, petition granted September 2, 1994). In this case, the Indiana Supreme Court "may definitively resolve two key environmental insurance issues—the proper construction of the 'sudden and accidental' and 'absolute pollution exclusions' in comprehensive general liability (CGL) policies." 9 T.X. L. Rep. 468 (September 28, 1994). "The case, which involves a leaking underground storage tank, will also answer the novel question whether gasoline held for retail is a 'pollutant' under the absolute exclusion." *Id.*

First State Insurance Company ("First State") had respective duties to defend and indemnify Great Lakes in thirteen underlying lawsuits filed against Great Lakes.¹⁸⁶

Background to the litigation reached back several years. In the 1960s, Great Lakes commenced manufacturing and selling pesticide products containing a chemical compound known as ethylene dibromide (EDB).¹⁸⁷ Great Lakes registered these products, according to applicable law, with both state and federal authorities.¹⁸⁸ The EDB products manufactured by Great Lakes were intended to be used as a "soil fumigant pesticide to control nematodes and other pests."¹⁸⁹ The EDB was applied by injecting the pesticide directly into the ground using a tractor-driven applicator.¹⁹⁰ In 1983, the USEPA banned the use of EDB as a soil fumigant pesticide.¹⁹¹ Thereafter, assorted litigants brought lawsuits for damages against Great Lakes, claiming soil and groundwater contamination caused by EDB.¹⁹² Great Lakes, in turn, sought indemnity and defense costs against its excess liability insurers, ISLIC and First State, under various excess liability insurance policies that had been issued from 1971 to 1979.¹⁹³ The parties made cross motions for summary judgment. The trial court granted summary judgment in favor of the insurers, finding as a matter of law that there was no duty to defend or indemnify Great Lakes regarding any of the underlying lawsuits.¹⁹⁴

On appeal, the pollution exclusion clause contained in various policies written by First State and ISLIC initially caught the attention of the court of appeals.¹⁹⁵ Nevertheless, the court ultimately concluded that this clause did not exclude insurance coverage because "Great Lakes is in the business of manufacturing and selling chemical compounds."¹⁹⁶ Like EDB, Great Lakes had obtained proper pesticide approvals for the manufacture and sale of the pesticides, and "EDB was neither a manufacturing *by-product [nor] a waste product* of Great Lakes"; instead, "EDB was the actual end-product of the manufacturing

186. *Great Lakes Chem. Corp.*, 638 N.E.2d at 849.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. The pollution exclusion clause contained in the First State and certain ISLIC policies excludes coverage for:

Bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

The pollution exclusion clause contained in the remainder of the ISLIC policies provides: "It is agreed this policy shall not apply to liability for contamination or pollution of land, water, air or real or personal property or any injuries or damages resulting therefrom caused by an occurrence." *Id.* at 850.

196. *Id.* at 851.

process."¹⁹⁷ In a trenchant paragraph of analysis, the court of appeals did a commendable job in effectively discerning the intent of the parties in entering the excess liability insurance contracts:

Great Lakes, like most manufacturers, purchased liability insurance to protect itself from damage caused by its products. Here, because of the nature of the product and its intended use, the damage caused by EDB was environmental pollution. However, simply because the damage alleged in the underlying lawsuits is environmental damage does not mean that the pollution exclusion clauses should automatically apply to exclude coverage. In this case, the underlying claims against Great Lakes are not in the nature of intentional or negligent environmental pollution; they are essentially product liability claims. To hold that the pollution exclusion clauses bar coverage to Great Lakes for the EDB claims would render the insurance coverage purchased by Great Lakes illusory. We hold that under the facts of this case, the EDB claims against Great Lakes are not excluded by the policies' pollution exclusion clauses.¹⁹⁸

B. Federal Opinions

In two opinions issued during 1994, the United States Court of Appeals for the Seventh Circuit rendered important environmental decisions in the area of hazardous waste law. Both opinions addressed issues arising out of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).¹⁹⁹

In *Akzo Coatings, Inc. v. Aigner Corp.*,²⁰⁰ the court took pains to distinguish the meaning and importance of statutory contribution actions from direct cost recovery actions. The facts of the case are richly textured. Between 1972 and 1985, more than 200 firms generated hazardous wastes that were ultimately disposed of at various facilities within an industrial park in Kingsbury, Indiana.²⁰¹ Among the facilities within the Kingsbury Industrial Park, known globally as the Fisher-Calco site, was the Two-Line Road facility, where Fisher-Calco Chemicals and Solvents, Inc. and its predecessors had conducted recycling operations from 1981 through 1985.²⁰² In 1988, the USEPA concluded that the waste stored at the Two-Line Road facility posed an imminent danger to the environment and issued a unilateral administrative order requiring Akzo and approximately twenty other potentially responsible parties (PRPs) to conduct emergency

197. *Id.* (emphasis added).

198. *Id.* In footnote 3 to the opinion, the Court of Appeals noted that:

The parties and the four amicus who filed briefs in this appeal expend considerable discussion on the issue of whether or not the phrase "sudden and accidental," as used within one of the pollution exclusion clauses, is ambiguous. Because we hold that in this case the exclusions themselves do not apply to exclude coverage, we leave the resolution of that issue for another day.

Id. at 851 n.3.

199. 42 U.S.C. §§ 9601-9675 (1988 & Supp. 1993).

200. 30 F.3d 761 (7th Cir. 1994).

201. *Id.* at 762.

202. *Id.*

removal activities at the Two-Line Road site.²⁰³ Akzo obeyed EPA's order; in the process of complying, however, Akzo incurred costs in excess of \$1.2 million.²⁰⁴ In December 1991, after several years of negotiations and preparation of a Record of Decision (ROD), the USEPA filed suit against over 200 PRPs to obtain complete cleanup of the overall Fisher-Calco site. About a year later, in 1992, a consent decree was approved by the district court.²⁰⁵ Aigner was a party to this overarching consent decree, but Akzo was not. After the district court's approval of the consent decree, Aigner moved to dismiss a pending CERCLA contribution action that had been brought by Akzo in 1991 for contribution to the emergency response expenses Akzo had incurred in the 1980s at the Two-Line Road facility.²⁰⁶ The district court granted Aigner's dispositive motion on the grounds that Akzo sought contribution for a "matter addressed" in the 1992 EPA consent decree and, therefore, was barred by Section 113(f) of CERCLA,²⁰⁷ which provides in pertinent part:

(2) Settlement

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement.²⁰⁸

In reviewing the district court's ruling, the Seventh Circuit initially focused on the nature of Akzo's claim against Aigner and concluded that "Akzo's claim is one for contribution."²⁰⁹ In reaching this result, the court of appeals reasoned as follows:

Akzo argues that its suit is really a direct cost recovery action brought under Section 107(a) rather than a suit for contribution under Section 113(f)(1); and it is true that Section 107(a) permits any "person"—not just the federal or state governments—to seek recovery of appropriate costs incurred in cleaning up a hazardous waste site. . . . Yet, Akzo has experienced no injury of the kind that would typically give rise to a direct claim under section 107(a)—it is not, for example, a landowner forced to clean up hazardous materials that a third party spilled onto its property or that migrated there from adjacent lands. Instead,

203. *Id.* at 762. The EPA issued this order pursuant to its power under 42 U.S.C. § 9606 (1988 & Supp. 1993).

204. *Akzo Coatings*, 30 F.3d at 763.

205. *Id.*

206. *Id.*

207. *Id.* (citing *Akzo Coatings, Inc. v. Aigner Corp.*, 803 F. Supp. 1380 (N.D. Ind. 1992) & 42 U.S.C.A. § 9613(f) (Supp. 1994)). Aigner's dispositive motion was brought as a motion to dismiss pursuant to FED. R. CIV. P. 12(b); this was converted by the district court into a summary judgment motion. *See* FED. R. CIV. P. 12(b). Although the district court's ruling did not dispose of all of Akzo's claims, the district court certified its ruling for immediate appeal pursuant to FED. R. CIV. P. 54(b). *Akzo Coatings*, 30 F.3d at 763-64.

208. 42 U.S.C. § 9613(f) (1988 & Supp. 1993).

209. *Akzo Coatings*, 30 F.3d at 764.

Akzo itself is a party liable in some measure for the contamination at the Fisher-Calo site, and the gist of Akzo's claim is that the costs it has incurred should be apportioned equitably amongst itself and the others responsible. . . . That is a quintessential claim for contribution. . . . Section 113(f)(1) confirms as much by permitting a firm to seek contribution from "any other" party held liable under sections 106 or 107. Whatever label Akzo may wish to use, its claim remains one by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make. Akzo's suit accordingly is governed by section 113(f).²¹⁰

In turning to the second and crucial question presented for review, which addressed "whether the contribution that Akzo seeks is for 'matters addressed' by the consent decree that Aigner signed,"²¹¹ the Seventh Circuit opined that "[t]he statute itself does not specify how [courts] are to determine what particular 'matters' a consent decree addresses."²¹² Choosing to utilize a "flexible approach to contribution claims"²¹³ and eschewing "any bright lines,"²¹⁴ the court of appeals scrutinized the terms of the 1992 consent order, which Aigner had signed, in juxtaposition with the emergency removal action undertaken by Akzo in the late 1980s. Noting that "[u]ltimately, the 'matters addressed' by a consent decree must be addressed in a manner consistent with both the reasonable expectations of the signatories and the equitable apportionment of costs that Congress has envisioned,"²¹⁵ the *Akzo Coatings* court held that "[b]ecause Akzo's preliminary clean-up work [was] . . . so clearly distinct from the long-range remedial matters addressed by the decree, Akzo [was] entitled to seek contribution from the settling PRPs under section 113(f)(1)."²¹⁶ However, the court went on to hold that its "conclusion is different with respect to the voluntary costs that Akzo incurred in conjunction with other PRPs in attempting to anticipate the claims that might be asserted against them by the EPA."²¹⁷ The court drew the distinction because:

In contrast to the limited nature of the initial removal work required by the EPA's 1988 order, the focus of these efforts [by Akzo] was on the long-term remedial action necessary to effect a permanent cleanup of the site. In essence, Akzo and its fellow PRPs were attempting to predict, and perhaps shape, the provisions of the consent decree. In that sense, these efforts were necessarily "matters addressed" by the decree, and in the absence of some indication that they accomplished tasks distinct from what the consent decree called for, claims for contribution based on these efforts are barred by section 113(f)(2).²¹⁸

210. *Id.* (citations omitted).

211. *Id.* at 765 (citation omitted).

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 766 (citation omitted).

216. *Id.* at 767 (footnote omitted).

217. *Id.*

218. *Id.*

In an opinion, concurring in part and dissenting in part, Judge Easterbrook upbraided the panel decision in *Akzo Coatings* by arguing that it was improper to “pluck” equitable considerations, delineated in Section 113(f)(1), and import those considerations into the straightforward settlement provisions of Section 113(f)(2).²¹⁹ Moreover, drawing in part on policy analysis from a recent United States Supreme Court admiralty opinion that concluded that contribution actions against parties that have settled are undesirable,²²⁰ Judge Easterbrook engaged in a lively and scholarly critique of the majority opinion. Judge Easterbrook’s criticism notwithstanding, however, the majority opinion in *Akzo Coatings* is essentially sound on the facts since the government’s agreement not to pursue the parties to a consent decree did not evince an intent to foreclose non-settling parties from seeking contribution. Indeed, “[i]f the covenant not to sue alone were held to be determinative of the scope of contribution protection, the United States would not be free to release settling parties from further litigation with the United States, without unavoidably cutting off all private party claims for response costs.”²²¹ Judge Easterbrook, however, articulates a compelling concern about the dangers of a too-narrow judicial interpretation of section 113(f)(2) which might, on other facts, discourage Superfund settlement agreements for cleanup of abandoned hazardous waste sites.²²²

*Town of Munster, Indiana v. Sherwin-Williams Co.*²²³ addressed the controversial question of whether CERCLA permits equitable, non-statutory affirmative defenses to section 107 liability under CERCLA. In concluding that laches could not be properly maintained as an affirmative defense to CERCLA liability, the court of appeals held that Congress had clearly evinced an intent to “restrict the [traditional] equitable powers of the federal courts” in the plain language of section 107.²²⁴ Importantly, the *Town of Munster* court saw “nothing illogical or untenable about a statutory scheme that bars equitable defenses to liability but allows consideration of equitable factors in apportioning costs between various responsible parties”²²⁵ under section 113(f)(1).²²⁶ Rather, the court construed section 107(b)’s limited defenses “as addressing the causation element of the underlying [statutory] tort and negating the plaintiff’s *prima facie* showing of liability.”²²⁷ Yet, the court went out of its way to point out that its preclusion of the defense of laches in CERCLA litigation did not necessarily preclude other matters—such as statute of limitations, res judicata and hold harmless agreements—which, in the court’s opinion, could be better characterized as “legal or statutory shield[s] against having to litigate”²²⁸ and were colorably supported by other specific statutory sections of CERCLA. In conclusion, the Seventh Circuit ruled that Munster’s cost recovery claim should be

219. *Id.* at 771 (Easterbrook, J., dissenting in part, concurring in part).

220. *Id.* at 773 (Easterbrook, J., dissenting in part, concurring in part) (citing McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1467 (1994)).

221. *Id.* at 776 (citing U.S. Amicus Br. at 19).

222. *Id.* at 774 (Easterbrook, J., dissenting in part, concurring in part).

223. 27 F.3d 1268 (7th Cir. 1994).

224. *Id.* at 1271 (citing 42 U.S.C.A. § 9607 (Supp. 1994)).

225. *Id.* at 1272 (footnote omitted).

226. 42 U.S.C.A. § 9613(f)(1) (Supp. 1994) (emphasis added).

227. *Town of Munster*, 27 F.3d at 1272.

228. *Id.*

reinstated "for a determination of liability and, if necessary, apportionment."²²⁹ According to the court, equitable factors would be appropriate considerations at the apportionment stage.²³⁰

The *Town of Munster* court's reasoning accords with the majority of federal circuit court of appeals that have considered the question of the availability of non-statutory equitable defenses to CERCLA section 107 liability.²³¹ The *Town of Munster* opinion properly distinguishes between the strictly limited causation-based defenses to CERCLA liability set forth in section 107(b) and the broad equitable factors for apportioning liability in section 113(f)(1) of the statute. Viewed in conjunction with the *Akzo Coatings* case,²³² *Town of Munster* adds important judicial insights about the delicate balance between legal and equitable considerations in resolving CERCLA litigation.

CONCLUSION

In 1993, the State of Indiana came close to foundering in its commitment to environmental law and policy because of a lack of commitment by the General Assembly to adequately fund IDEM.²³³ However, during 1994, the General Assembly exhibited its commitment to IDEM and the governor signed new legislation that substantially increased IDEM's funding for carrying out key environmental programs. The quid pro quo for this commitment, however, was the General Assembly's insistence on a series of strict accountability measures in reviewing the performance of the state environmental agency. On the surface, this exchange seems to be a fair compromise between competing political interests in the state. Moreover, the reform legislation holds promise in improving IDEM's operations and sense of priorities. However, only time will tell whether the specific accountability measures imposed on IDEM will be successful in achieving effective and efficient environmental protection for the citizens of the State of Indiana.

In addition to an assortment of miscellaneous environmental and natural resources legislation also enacted into state law during 1994, the state and federal courts issued several important decisions addressing such matters as the power of state agencies to condition coal mining permits in order to protect offsite contamination, to questions of defenses to liability and settlement protections under CERCLA. In many ways, 1994 was the most important year in the development of environmental policy in Indiana in the last decade.

229. *Id.* at 1274.

230. *Id.*

231. See *Velsicol Chem. Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993) (holding that the doctrine of laches may not bar a CERCLA cost recovery action); *General Elec. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991) (holding that CERCLA does not provide for an unclean hands defense to liability); *Smith Land & Imp. Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (concluding that under CERCLA the doctrine of *caveat emptor* is not a defense to liability for contribution but may be considered in mitigation of the amount due).

232. See *supra* notes 183-98 and accompanying text.

233. See generally Blomquist, *supra* note 6.

HEALTH CARE LAW: A SURVEY OF 1994 DEVELOPMENTS

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INTRODUCTION

This Survey highlights several notable developments during the 1994 Survey period in the rapidly expanding and diverse field of health care law.

While numerous profound changes frequently occur in this area of law, this Survey focuses on those areas most likely to be of use to practitioners, emphasizing aspects of health care law that impact broadly on numerous client interests. The Survey is, however, by no means a comprehensive or complete discussion of all or even most of the significant developments in the field, but is a summary of several important changes in the areas of medical malpractice, products liability, Medicare and Medicaid reimbursement, patient dumping, legislative and regulatory initiatives, peer review, antitrust and patient consent.

I. MEDICAL MALPRACTICE

Medical malpractice cases dealt with the running of the statute of limitations, expert witness qualifications, the impact rule, the medical review panel and standard of care.

A. Judicial Opinions

1. *Statute of Limitations*.—In *Follett v. Davis*,¹ the Indiana Court of Appeals dealt with the doctrine of a “continuing wrong.” A continuing wrong in a medical malpractice action allows a plaintiff to bring an action after the two-year statute of limitations has expired based on a physician’s failure to properly diagnose and treat a patient’s medical condition.

After discovering a lump in her right breast, Ms. Follett, the plaintiff, went to see her physician, Dr. Davis. However, Dr. Davis was unavailable to see her on that day. Dr. Davis’s office staff directed Ms. Follett to a radiology department for a mammogram. Contrary to office procedure, Dr. Davis’s staff did not schedule Ms. Follett for a follow-up visit to review the details of the mammogram. The office staff told Ms. Follett that when they received the mammogram results, Dr. Davis would contact her if there was any problem. Otherwise, she could assume everything was normal.

The radiology report, which accompanied Ms. Follett’s mammogram, stated that the breast lump was not normal and recommended follow-up tests. Dr. Davis reviewed the report and considered it negative for breast cancer. Ms. Follett was not contacted. Two

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1. 636 N.E.2d 1282 (Ind. Ct. App. 1994).

years later, Ms. Follett began to experience pain with the same lump. An examination at that time revealed the lump was cancerous.

In her suit, Ms. Follett claimed she suffered a continuing wrong based upon Dr. Davis's failure to diagnose her condition and implement timely treatment.² Because she did not discover the failure to diagnose until after the two-year statute of limitations³ had expired, Ms. Follett argued that the statute of limitations on her action did not begin to run until the end of the wrongful act, which was the continuous omission to act.⁴ Thus, the wrongful act would not end until proper diagnosis and treatment began.

The court found for Ms. Follett, holding that had the physician's office procedures been properly followed, Dr. Davis would have had occasion to diagnose Ms. Follett's condition sooner.⁵ The court of appeals reversed the trial court's summary judgment for the physician.⁶

This case is noteworthy because it suggests that a failure to follow normal patient procedures may toll a statute of limitation and form the basis of a continuing wrong by the intentional withholding of information. Providers are well advised to follow procedures that they themselves have developed because courts may infer that a departure from self-imposed standards is tantamount to a failure to adhere to an appropriate standard of care.

In *Hughes v. Glaese*,⁷ also relevant to Indiana's statute of limitations for medical malpractice, Dr. Hughes informed the plaintiff, Ms. Glaese, after her abdominal repair surgery that she was "okay" without disclosing to her the results of a chest X-ray that revealed a potentially cancerous growth. Almost three years later, Ms. Glaese was diagnosed with Hodgkin's disease.⁸ Ms. Glaese asserted that Dr. Hughes' failure to diagnose and fully disclose the results of her earlier chest X-ray caused her to lose valuable time in her fight against the disease. Ms. Glaese did not assert that Dr. Hughes intentionally misrepresented her condition to her; instead she based her malpractice claim on his failure to diagnose her condition. She claimed that the doctor's failure to disclose this condition was fraudulent concealment, which tolled the statute of limitations.

The court ruled that the physician-patient relationship ended after the initial abdominal repair surgery when Dr. Hughes released Ms. Glaese to the care of her regular family physician.⁹ Since the two-year statute of limitations began to run at that point, Ms. Glaese failed to file her medical malpractice action within the two-year period.

Indiana courts have recognized two variants of fraudulent concealment, active and constructive, that espouse an equitable doctrine tolling the statute of limitations in certain cases.¹⁰ Where fraudulent concealment is active, the statute is tolled until discovery, or opportunity for discovery. However, where failure to disclose is incident to a confidential

2. *Id.* at 1284.

3. IND. CODE § 27-12-7-1 (1993).

4. *Follett*, 636 N.E.2d at 1284.

5. *Id.* at 1283.

6. *Id.* at 1284.

7. 637 N.E.2d 822 (Ind. Ct. App. 1994).

8. A malignant disorder of unknown etiology producing enlargement of lymphoid tissue, spleen, and liver with invasion of other tissues.

9. *Id.* at 826.

10. See *Guy v. Schuldt*, 138 N.E.2d 891 (Ind. 1956).

relationship, such as the physician-patient relationship, and not active fraud, constructive fraudulent concealment terminates when the relationship terminates. Since there was nothing extraordinary about the termination of the physician-patient relationship between Ms. Glaese and Dr. Hughes other than a possible prior misdiagnosis, the court held that the normal application of the statute of limitations was appropriate. To hold otherwise would subject every instance of wrongful diagnosis and the termination of the physician-patient relationship to characterization as a possible case of constructive fraudulent concealment.¹¹ Judgment was reversed in favor of Dr. Hughes.¹²

In *Weinberg v. Bess*,¹³ the court of appeals again addressed the issue of the time at which the physician-patient relationship ends so as to commence the running of the statute of limitations for a claim of medical malpractice. More specifically, the court addressed the issue of when fraudulent concealment by a physician may toll the statute of limitations in a medical malpractice action. At issue was Dr. Weinberg's statement to Ms. Bess that she had received saline breast implants during plastic surgery when in fact Dr. Weinberg had used silicone implants.¹⁴

Prior to Ms. Bess's surgery in January 1985, Dr. Weinberg told Ms. Bess that he intended to use saline implants. After surgery, Ms. Bess saw Dr. Weinberg several times for follow-up care. Her final visit was on April 3, 1986. After a great deal of media attention concerning the risks of silicone breast implants, Ms. Bess contacted Dr. Weinberg's office by telephone in June 1991 to inquire about the type of implant she had received. Dr. Weinberg's office staff again told Ms. Bess she had received saline implants.

In May 1992, Ms. Bess went to the hospital and reviewed her medical records. As a result of this review, Ms. Bess learned for the first time that she had received silicone implants. She filed a malpractice action against Dr. Weinberg in July 1992, six years after her last visit to his office. At trial, Dr. Weinberg argued that because Indiana law requires a malpractice action be brought within two years from the date of the alleged act, omission or neglect,¹⁵ the plaintiff's action was not timely filed.¹⁶ Ms. Bess argued that the doctrine of fraudulent concealment estopped Dr. Weinberg from asserting a statute of limitations defense.¹⁷

As no appellee brief was filed in the case, a lesser standard of review was employed by the court wherein it sought only to determine if "prima facie error" had occurred at trial. The court agreed that Dr. Weinberg's conduct constituted fraudulent concealment.¹⁸ However, since such fraud was constructive, not active, it terminated at the conclusion of the physician-patient relationship. At that point, the malpractice statute of limitations began to run. The court concluded that the physician-patient relationship terminated and the statute of limitations began to run at the end of Ms. Bess's last office visit.

11. *Hughes*, 637 N.E.2d at 825-26.

12. *Id.* at 826.

13. 638 N.E.2d 841 (Ind. Ct. App. 1994) (Robertson, J., dissenting).

14. *Id.* at 843.

15. IND. CODE § 27-12-7-1 (1993).

16. *Weinberg*, 638 N.E.2d at 841.

17. *Id.* at 844.

18. *Id.*

The court stated that "fraudulent concealment tolls the running of the statute of limitations until either the physician-patient relationship is terminated, the patient discovers the malpractice or the patient learns information which in the exercise of due diligence would lead to the discovery of the malpractice."¹⁹ Ms. Bess's assertion that the physician-patient relationship continued beyond her final office visit because she relied upon the physician for treatment and counsel was insufficient as a matter of law to create a factual issue. Likewise, Ms. Bess could not resurrect the claim by scheduling an office appointment in March 1992 long after the statute had run. With one judge dissenting, the court found for Dr. Weinberg.²⁰

Here, the physician's initial misrepresentation as to the intended use of saline implants was insufficient to toll the statute of limitations indefinitely because the physician-patient relationship had terminated more than two years prior to suit being filed, and the fraudulent concealment was of a constructive, and not active, nature. Thus the statute began to run from the last occasion of an actual patient-physician relationship. Dr. Weinberg clearly benefited from the more expansive standard of review since there were ongoing instances of continuing misrepresentation that arguably could have been deemed active fraudulent concealment, which would have tolled the statute until discovery, or opportunity for discovery, of the malpractice.

2. *Expert Witnesses*.—In *Snyder v. Cobb*,²¹ the court addressed the issue of the qualifications of expert witnesses in medical malpractice actions. The defendants in this malpractice action included an obstetrician/gynecologist and an anesthesiologist. James and Patricia Snyder filed suit against the physicians and a hospital for their alleged negligence while attempting to resuscitate the Snyders' infant daughter after premature delivery. As a result of the alleged negligence, the infant suffered permanent brain damage, cerebral palsy and a hearing impairment.

Although the Snyders' expert witness was neither an obstetrician nor an anesthesiologist, he was a pediatrician with expertise in the resuscitation of newborns. The expert stated at trial that he was familiar with the applicable standard of care required of obstetricians and anesthesiologists in similar communities. The expert also testified that he knew such physicians' duties with respect to high-risk prenatal situations, delivery and the necessary medical care under such circumstances. Based on this knowledge, the expert testified that the defendants breached the applicable standard of care and that the infant's injuries were a direct result of the defendants' negligence. The trial court granted summary judgment for the defendants, and the plaintiffs appealed.²²

On appeal, the defendants argued that the plaintiffs' expert was not qualified to testify as to the appropriate standard of care since he did not have sufficient specific knowledge as would an anesthesiologist or an obstetrician and his opinion at trial should have been inadmissible.²³ The court disagreed, holding that the expert's general knowledge of the

19. *Id.*

20. *Id.* (Robertson, J., dissenting).

21. 638 N.E.2d 442 (Ind. Ct. App. 1994).

22. *Id.* at 445.

23. *Id.* at 446.

subject matter was sufficient.²⁴ The expert's "bare assertion that he was familiar with the standard of care was sufficient, and we find no error."²⁵

This case illustrates the breadth of the trial courts' discretion in determining whether certain physicians qualify as experts for the purpose of testifying in medical malpractice actions.

3. *Modification of Impact Rule in Claims for Damages for Emotional Distress*.—*J.L. v. Mortell*²⁶ concerns a modification of the so-called "impact rule." The impact rule generally does not allow a plaintiff to recover damages in claims of emotional distress unless such emotional distress is accompanied by or is the result of a physical injury.²⁷ In this case, after receiving a referral from her family physician, J.L. began receiving physical therapy for abductor muscle spasms in 1986.²⁸ After several therapy visits, the physical therapist began vaginal massage as part of the treatment for her abductor muscle spasms. In 1990, J.L. began seeing another physical therapist who informed J.L. that continuation of such treatment was contraindicated. Thereafter, J.L. was diagnosed with post-traumatic stress syndrome resulting from such allegedly inappropriate treatment. After filing a claim for malpractice against the first physical therapist, J.L. and the defendant physical therapist entered into a settlement agreement for \$100,000, the statutory limit of the physical therapist's liability under the Malpractice Act. J.L. then filed a claim for excess damages from the Patient's Compensation Fund.²⁹

At the close of J.L.'s case, Mr. Mortell, the Commissioner of Insurance, filed a motion to dismiss under Indiana Trial Rule 41(B).³⁰ The trial court granted the motion to dismiss and held that J.L. could not recover damages for emotional distress since the distress was not accompanied by, nor did it result from, a physical injury. Since the emotional distress experienced by J.L. was the result of the inappropriate treatment, it was a non-compensable injury under the Patient's Compensation Fund.

The court of appeals examined three issues regarding J.L.'s claim. The first issue discussed was whether Mr. Mortell waived his right to contest the determination of damages to J.L. for failure to timely file an objection contesting the award of damages. The court dismissed this contention out of hand.³¹

The second issue was whether the trial court exceeded its authority in making a determination as to whether J.L.'s injuries were compensable from the Patient's Compensation Fund. In support of this contention, J.L. relied upon *Dillon v. Glover*,³² which stated that the Commissioner of Insurance may not litigate liability of a health care provider after the issue of liability has been determined prior to submission to the Patient's Compensation Fund. The court agreed and stated that Mr. Mortell was not

24. *Id.*

25. *Id.*

26. 633 N.E.2d 300 (Ind. Ct. App. 1994). Mr. Mortell was the State Insurance Commissioner authorized to administer and defend claims against the Patient's Compensation Fund.

27. *Id.* at 304.

28. *Id.* at 301.

29. *Id.*

30. *Id.*

31. *Id.* at 303.

32. 597 N.E.2d 971 (Ind. Ct. App. 1992).

permitted to challenge either the liability or proximate cause issues that were deemed established by a settlement with the health care provider.³³ However, the court reasoned that the denial of J.L.'s claim was not the result of a re-examination of the therapist's liability. Instead, the trial court's denial of relief to J.L. was due to its conclusion that recovery for emotional distress without an accompanying physical injury could not be compensated under the Patient's Compensation Fund.

Finally, the court addressed whether damages for emotional distress could be awarded to J.L. without being accompanied by a physical injury pursuant to the impact rule. In determining that J.L. could recover for emotional distress suffered without an accompanying physical injury, the court relied upon a modified version of the impact rule as set out in *Shuamber v. Henderson*.³⁴ In *Shuamber*, the Indiana Supreme Court held:

When . . . a plaintiff sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, . . . such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff.³⁵

The court reasoned that the modified impact rule applied in the *Mortell* case.³⁶ J.L. had suffered a direct impact from the vaginal massage which was deemed to be a negligent form of treatment as evidenced by the settlement agreement. The negligent massage also resulted in severe emotional trauma that was serious in nature and likely to occur in a reasonable person. Therefore, the court reasoned, J.L. was entitled to maintain an action to recover excess damages from the Patient's Compensation Fund regardless of whether the trauma arose out of or was accompanied by any physical injury.³⁷ Accordingly, the court reversed the decision and remanded the case to the trial court on J.L.'s claim of emotional distress.³⁸

This case may represent a potential for additional damages in medical malpractice cases where proof of emotional injuries exists. Any negligent physical touching may be sufficient to apply the modified impact rule since physical injury to the claimant may not be required.

4. *Duty of Care*.—In *Hook's-SuperX, Inc. v. McLaughlin*,³⁹ the plaintiff, Mr. McLaughlin, sued a pharmacy for negligence because the pharmacist had refilled his prescription for propoxyphene salt, a Schedule IV narcotic drug under the Federal Controlled Substance Act. The pharmacist had called Mr. McLaughlin's physician regarding the propriety of the prescription and the physician authorized the continuing refill of the drug. Mr. McLaughlin had a chemical dependency problem with narcotic medications. He claimed that the defendant pharmacy had breached the duty of care it

33. *Mortell*, 633 N.E.2d at 303.

34. 579 N.E.2d 452 (Ind. 1991).

35. *Id.* at 456.

36. *Mortell*, 633 N.E.2d at 304.

37. *Id.*

38. *Id.*

39. 632 N.E.2d 365 (Ind. Ct. App. 1994).

owed to him when it filled the prescriptions ordered for him by his physician. It should have been obvious to the pharmacist, Mr. McLaughlin argued, based on the large volume of refills he had received for narcotic medication, that Mr. McLaughlin had a chemical dependency problem.

Mr. McLaughlin asserted three duties of care: a statutory duty, a gratuitously assumed duty, and a general duty. The court of appeals found against him on all three theories. In holding for the pharmacy, the court stated, "When a pharmacist calls a physician concerning a question about a patient's prescription, the pharmacist should be permitted to rely on the physician's instructions in good faith as a matter of law."⁴⁰

The supreme court granted transfer and vacated the opinion of the court of appeals, affirming the trial court in its denial of the defendant's motion for summary judgment.⁴¹ In so doing, the court found a direct relationship between pharmacists and customers that is independent of the relationship between physicians and patients and is sufficient to create a duty of care.⁴² Whether that duty has been breached will depend on the degree of care that an ordinarily prudent pharmacist would exercise in the same or similar circumstances. This determination is usually a question of fact.⁴³ Accordingly, the trier of fact should determine whether the duty was breached in the instant case. This case is important because the supreme court, while recognizing that physicians remain ultimately responsible for their orders, held that other professionals on the health care team must exercise their independent professional judgment in the fulfillment of their duty of care to the patient.

5. *Products Liability*.—*St. Mary Medical Center, Inc. v. Casko*⁴⁴ was a case of first impression in Indiana. Mr. Casko received a pacemaker while he was a patient at St. Mary Medical Center ("Hospital"). The pacemaker later failed and Mr. Casko brought an action against the Hospital, which included a products liability claim.

The Hospital argued that since it was not a dealer engaged in selling pacemakers, a products liability action was inappropriate. The Hospital contended that it was in the business of providing professional medical services to patients, which included the provision of certain medical equipment. The Hospital argued that when medical equipment is provided to patients, it is incidental to the overall primary purpose of providing health care. In finding for the Hospital, the court cited a California appellate opinion:

Unlike the products sold in a hospital gift shop, for which the hospital is strictly liable, the pacemaker provided to the patient is necessary to the patient's medical treatment. While the hospital itself does not use its own medical skill or knowledge in providing its services in connection with the provision of the pacemaker for the patient, the hospital still is engaged in the process of providing everything necessary to furnish the patient with a course of treatment.

40. *Id.* at 368.

41. 642 N.E.2d 514, 521 (Ind. 1994).

42. *Id.* at 517.

43. *Id.* at 519.

44. 639 N.E.2d 312 (Ind. Ct. App. 1994).

In this regard, the hospital's actions concerning the provision of the pacemaker are "integrally related to its primary function of providing medical services."⁴⁵

Under the Indiana Products Liability Act,⁴⁶ the Hospital could not be held strictly liable as a seller of pacemakers since the complaint addressed its actions as a health care provider.

This case apparently turned on the provision of medical equipment being only a part of the overall service component of hospitals. The result might have been different had the Hospital or a durable medical equipment subsidiary or affiliate been primarily in the business of acquiring and reselling medical equipment. It also appears that the court construed the patient to be the ultimate purchaser and the Hospital's liability may have been limited to an instance of an alteration or modification of the medical equipment.

II. MEDICAID/MEDICARE

Recently, the Indiana Medicaid program has been the focus of great change in the way it pays providers. New reimbursement regulations were promulgated for virtually all Medicaid providers. The courts also dealt with a Boren Amendment challenge to the nursing home Medicaid reimbursement system. Finally, the courts handed down an antidumping case and a class action case concerning Indiana's method of determining Medicaid eligibility.

A. Judicial Opinions

1. Indiana Medicaid Is under No Obligation to Reimburse Long Term Pediatric Care Facility for Higher Levels of Care.—In *Indiana State Department of Public Welfare v. Lifelines of Indianapolis, Limited Partnership*,⁴⁷ the court of appeals addressed whether federal or state law compels the Indiana State Department of Public Welfare (DPW)⁴⁸ to reimburse Lifelines of Indianapolis ("Lifelines") costs for providing pediatric subacute care.⁴⁹

Lifelines was licensed and certified as a long-term care nursing facility under the Indiana Medicaid Program. As a nursing facility, Lifelines received an initial Medicaid rate that reimbursed Lifelines for only 22.4% of its actual costs. In accordance with Medicaid regulations, Lifelines appealed the initial rate determination to an administrative law judge who determined that the rate was inadequate. The State Board of Public Welfare ("Board") reversed the decision of the administrative law judge and reinstated the initial rate as calculated by DPW. Lifelines appealed to the Hamilton County Circuit Court. The circuit court set aside the Board's decision and DPW appealed.

45. *Id.* at 314 (quoting *Hector v. Cedars-Sinai Medical Ctr.*, 180 Cal.App.3d 493, 506-07 (1986)).

46. IND. CODE §§ 33-1-1.5-1 to -8 (1993).

47. 637 N.E.2d 1349 (Ind. Ct. App. 1994).

48. The Indiana State Department of Public Welfare is now referred to as the Indiana Family and Social Services Administration.

49. Subacute care is a level of care requiring more intensive staffing and services than care normally rendered in nursing facilities, but less intensive than is provided in acute care hospitals.

To support its argument that the State was not required to compensate Lifelines for long-term pediatric subacute care, DPW cited *Lett v. Magnant*.⁵⁰ In *Lett*, a certified long-term care facility that provided services to the profoundly mentally retarded requested that the State reimburse it at a greater rate due to the higher level of services it provided. Determining that the State did not violate the federal Boren Amendment,⁵¹ the Seventh Circuit Court of Appeals reversed the district court's decision, which stated that the facility's costs for providing a higher level of care were reasonably necessary for a facility to provide such services and that the costs had to be "incurred in order to provide legally sufficient care and services."⁵² The court of appeals determined that the district court had misapplied the Boren Amendment: "[T]he Boren Amendment had been enacted to move the State away from the payment of the reasonable costs of services actually provided. Accordingly, the amendment was violated only when the rates in the aggregate were arbitrary and capricious."⁵³

Although the *Lifelines* court admitted that "there is imprecision in the State's reimbursement system,"⁵⁴ in that the State did not reimburse for pediatric subacute care, the court determined that DPW was not obligated to make an exception for "a facility providing a higher level of care than its certified counterparts."⁵⁵ Therefore, because the State's method of reimbursing skilled nursing facilities was reasonable in the "aggregate," the system was neither "arbitrary and capricious" nor unreasonable because DPW refused to "tailor" its reimbursement scheme to each participating facility. Further, although the Boren Amendment requires some uniformity among providers of long-term care services, it is not required to reimburse all facilities their costs due to the fact that some facilities may provide a specialized level of care.⁵⁶

The court ruled that because Lifelines chose to specialize in pediatric long term subacute care, with the knowledge that DPW did not reimburse these particular facilities at a higher rate, "the State need not pay for the care provided by Lifelines if a more efficient and economical option is available."⁵⁷ Once again referring to *Lett*, the court stated:

[I]f a facility can obtain reasonable and adequate reimbursement for the care and services it provides by meeting the licensing and/or certification standards of a higher recognized category of care, the State need not fine-tune its system for the anomaly. Hence, it is our conclusion that the State need not create an exception to its Medicaid reimbursement plan for Lifelines in order to comply with federal

50. 965 F.2d 251 (7th Cir. 1992).

51. The federal Boren Amendment requires Medicaid reimbursement to be provided in accordance with rates that are reasonable and adequate to meet the costs incurred by efficiently and economically operated facilities. 42 U.S.C. §1396a(a)(13)(A) (1988 & Supp. 1993).

52. *Lett*, 965 F.2d. at 257.

53. *Lifelines*, 637 N.E.2d at 1358 (citing *Lett*, 965 F.2d at 257).

54. *Id.* at 1357.

55. *Id.*

56. *Id.* at 1351.

57. *Id.* at 1358.

and state statutory law. Neither has the State misapplied its own regulations by comparing Lifelines to other “dissimilar” skilled [nursing] facilities.⁵⁸

This case holds that even though treatment rendered to Medicaid beneficiaries may be medically necessary and appropriate, the costs of such service need not be reimbursed if they exceed the established level of care and payment that the State has established by regulation. In essence, the State does not have an obligation to provide a higher level of care even if there may exist some need for the level of care. Parenthetically, to gain a higher reimbursement rate, Lifelines subsequently became licensed and certified as a hospital.⁵⁹

2. *Implementation of Medicaid Reimbursement Methodology Violative of the Boren Amendment.* Indiana State Board of Public Welfare v. Tioga Pines Living Center, Inc.⁶⁰—In January 1990, a plaintiff class of nursing homes filed an action against the State relating to its Medicaid reimbursement scheme, found at Title 470, Rule 5-4.1 of the Indiana Administrative Code (“Rule 4.1”), on the basis that it did not conform with certain federal or state statutory requirements.⁶¹ On February 26, 1991, after a trial had commenced on Rule 4.1, the State adopted a new Medicaid reimbursement scheme, found at Title 470, Rule 5-4.2 of the Indiana Administrative Code (“Rule 4.2”). The class moved to supplement its complaint to include a challenge to Rule 4.2 and to obtain a preliminary injunction barring the implementation of Rule 4.2. The trial court ruled in favor of the class regarding Rule 4.1 and an appeal was taken to the Indiana Supreme Court, which reversed the trial court’s holding that Rule 4.1 was in compliance with the requirements of the Boren Amendment.⁶² The First District Court of Appeals withheld ruling on Rule 4.2 until a review of Rule 4.1 was completed. The issue before the court of appeals regarding Rule 4.2 was whether the trial court was correct in granting the preliminary injunction regarding Rule 4.2 pursuant to the Boren Amendment.

In determining whether the trial court had abused its discretion in granting the preliminary injunction regarding Rule 4.2, the court had to determine whether (1) the plaintiffs’ remedies at law were inadequate; (2) irreparable harm would be inflicted if the injunction was not issued; (3) the plaintiffs had demonstrated a reasonable likelihood of success at trial by establishing a *prima facie* case; (4) the threatened injury to the plaintiffs outweighed the threatened harm that the grant of an injunction would occasion upon defendant; and (5) the preliminary injunction, if granted, would be against the public interest.⁶³

Regarding the plaintiffs’ likelihood of success on the merits, the court of appeals undertook an analysis of the Federal Boren Amendment, which requires, in part, that a state Medicaid plan provide

for payment . . . of . . . nursing facility services, and services in an intermediate care facility for the mentally retarded provided under the plan through the use

58. *Id.*

59. *Id.* at 1353 n.4.

60. 637 N.E.2d 1306 (Ind. Ct. App. 1994).

61. *Id.* at 1310.

62. 42 U.S.C. § 1396(a)(13)(A) (1988 & Supp. 1993).

63. *Tioga Pines*, 637 N.E.2d at 1311.

of rates . . . which the State finds, and makes assurances satisfactory to the Secretary [of the Department of Health and Human Services], are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable [s]tate and [f]ederal laws, regulations, and quality and safety standards.⁶⁴

In conducting this analysis, the State must make "findings" that the state plan reimburses costs that efficiently and economically operated facilities must incur in order to provide the level of care required by federal and state standards. "The requirement that the state make 'findings' is thus not a mere formality, but an entirely independent, necessary prerequisite to the requirement of assurances."⁶⁵

The court of appeals agreed with the trial court and determined that the state did not engage in an adequate findings process as required by the Boren Amendment. This was based on the fact that the findings conducted by the state's Medicaid rate-setting contractor excluded data from "better than half of the 744 providers in the class" due to a lack of historical data or because for relevant periods these providers had an occupancy rate of less than eighty percent.⁶⁶ Therefore, the findings could predict the extent of reimbursement that would be received by only forty-three percent of the class.⁶⁷ Additionally, the state did not supply the mandatory objective assessment of quality care and reasonable access required by the Boren Amendment.⁶⁸

The court then determined whether the plaintiffs had an adequate remedy at law and whether the plaintiffs would suffer irreparable harm if the injunction were not issued. Finding this condition satisfied, the court held that the plaintiffs had no adequate remedy at law "[b]ecause the implementation of the new regulations [would] result in a reduction of between Nine to Eleven Million Dollars in reimbursement being paid to the class."⁶⁹

Finally, the court determined that the public interest was served "by requiring [the state] to live up to the responsibilities with which [it is] charged under federal law without usurping [the state's] role in the rate setting process."⁷⁰ The court then reviewed the balance of the hardships and the public interest threatened by the grant of the preliminary injunction. The court determined that the state suffered no hardship because the injunction merely prohibited the state from a continuing violation of the Boren Amendment and that the state would suffer no particular injury in continuing reimbursement pursuant to Rule 4.1.⁷¹

Under *Tioga Pines*, large payment reductions potentially resulting in facility closures or fiscal insolvency may represent irreparable harm for which no adequate remedy at law exists since monetary damages subsequently awarded may be insufficient to rectify the

64. 42 U.S.C. § 1396a(a)(13)(A) (1988 & Supp. 1993).

65. *Tioga Pines*, 637 N.E.2d at 1312.

66. *Id.* at 1314.

67. *Id.*

68. *Id.*

69. *Id.* at 1316 n.5.

70. *Id.* at 1318 (quoting *Thomas v. Johnston*, 557 F. Supp. 879, 919 (W.D. Tx. 1983)).

71. *Id.* at 1317.

current unlawful activity of the state. *Tioga Pines* also reaffirms other Boren Amendment cases that require the state to conduct an adequate findings process before implementing a new Medicaid reimbursement system.

3. *Patient Dumping*.—In *Harris v. Health & Hospital Corp.*,⁷² an action was brought against defendant Hospital alleging that it had violated the Emergency Medical Treatment and Active Labor Act (“Act”)⁷³ by discharging Ms. Harris from its emergency room after an admission for severe chest pain. Within two hours of discharge, she was readmitted in cardiac arrest and died shortly thereafter. At the time of her first admission, the attending emergency room physician made a “differential diagnosis” of costochondritis and hyperventilation syndrome.⁷⁴ Plaintiff argued that because myocardial infarction and pulmonary embolus were within the range of possible diagnoses, defendant knew that Ms. Harris was suffering from an emergency medical condition and her subsequent discharge violated the Act.⁷⁵

The court ruled that because the plaintiff failed to present any evidence that the physician knew Ms. Harris was suffering from anything but the conditions he originally listed in her medical record, she was not in an emergency medical condition at the time of her first admission and, accordingly, the hospital did not violate the Act when she was discharged. Even if it could be argued that an inaccurate diagnosis occurred in this case, the pertinent finding of the court is that an appropriate screening and stabilization are the principal requirements of the Act and both were present in the instant case.

4. *Medicaid Eligibility*. *Cherry v. Sullivan*.⁷⁶—In May 1990, a class action suit was filed against the Secretary of the Indiana Family and Social Services Administration seeking declaratory and injunctive relief. The class consisted of all married Medicaid applicants who had lived in a nursing facility prior to September 1989, and who had further been determined to be ineligible for Medicaid because of the amount of assets held by spouses living at home. Additionally, the plaintiffs mounted a constitutional challenge under the Equal Protection Clause of the United States Constitution.⁷⁷

The court ruled that Indiana’s Medicaid eligibility rules were proper in considering a non-institutionalized spouse’s access to assets in making Medicaid eligibility determinations.⁷⁸ In support of this result, the court reviewed the state’s interest in limiting its Medicaid expenditures and allocating finite Medicaid funds to truly needy persons. The court also stated: “Indiana has the additional legitimate interest in recognizing the marital relationship for what it is, a relationship of interdependence wherein it is neither unfair nor unrealistic to require one spouse to support the other, in particular to help meet the obligation to pay for family medical bills.”⁷⁹

While non-institutionalized spouses require sufficient resources to care for themselves, this decision is supported by strong public policy considerations. If the

72. 852 F. Supp. 701 (S.D. Ind. 1994).

73. 42 U.S.C. §§ 1395dd (1988 & Supp. 1993).

74. A differential diagnosis is a broad diagnosis which includes several different possible diagnoses.

75. 852 F. Supp. at 702.

76. 30 F.3d 73 (7th Cir. 1994).

77. *Id.* at 75.

78. *Id.*

79. *Id.*

availability of assets to the spouse of a Medicaid recipient were not taken into consideration in making an eligibility determination, many persons of means could arrange their affairs so as to establish eligibility for a spouse requiring medical care. This could substantially impair the state's ability to provide Medicaid services for those most in need.

B. Legislative Action

House Enrolled Act 1298 empowers the Indiana Attorney General and an investigator of the Medicaid Fraud Control Unit to issue, serve and apply to a court for enforcement of subpoenas to compel an individual to produce books, papers, or other records, including records stored in electronic data systems, for inspection and examination.⁸⁰ Additionally, a subpoena may be issued and enforced compelling an individual to appear before the Attorney General in person.⁸¹ This Act also makes the knowing or intentional commission of Medicaid fraud a Class D felony, unless the fair market value of the claim or payment at issue exceeds \$50,000, in which case it is a Class C felony.⁸²

C. Administrative Action

1. *Reimbursement*.—In 1994, the Office of Medicaid Policy and Planning (OMPP) published a number of reimbursement regulations that substantially changed the way certain health care providers are reimbursed under the Indiana Medicaid program.

The new regulations revised hospital inpatient reimbursement procedures. Hospital reimbursement under the new Medicaid reimbursement system is based on a Diagnostic Related Group (DRG) system.⁸³ Each in-patient hospital stay is now reimbursed using a prospective system based upon DRGs.⁸⁴ These payments will constitute complete payment to hospitals, and there will no longer be any end-of-year adjustments.⁸⁵ Reimbursement for inpatient hospital stays using the DRG methodology will equal the sum of the DRG rate, the capital rate, the medical education rate, and, where applicable, the outlier payment amount.⁸⁶

The new regulations also revise hospital outpatient service reimbursement procedures. Reimbursement for outpatient services will be subject to the lower of submitted charges or the established fee schedule allowance for the particular procedure.⁸⁷ Surgical procedures are classified into groups corresponding to the Medicare Ambulatory Surgical Center (ASC) methodology and paid an established rate for each ASC group.⁸⁸ Payment is based upon a blended rate equal to fifty percent of the fiscal year 1992 Indiana statewide median allowed amount for that service and fifty percent of the Medicare ASC

80. IND. CODE § 4-6-10-3 (Supp. 1994).

81. *Id.*

82. IND. CODE §35-43-5-7.1 (Supp. 1994).

83. IND. ADMIN. CODE tit. 405, r. 1-10.5-2(h) (1994).

84. *Id.* at r. 1-10.5-3(a).

85. *Id.*

86. *Id.* at r. 1-10.5-3(b).

87. *Id.* at r. 1-8-3(a) (1995).

88. *Id.* at r. 1-8-3(b).

rate.⁸⁹ Emergency care reimbursement is based upon a state-wide fee schedule of HCPCS codes.⁹⁰ Reimbursement for laboratory procedures and the technical component of radiology procedures will be based on ninety-five percent of the Medicare allowance that was in effect prior to the adoption of the Resource Based Relative Value Scale for Medicare services.⁹¹

Medicaid recipients are to be charged a three dollar copayment for nonemergency services provided in an emergency room setting.⁹² The provider is responsible for collecting the copayment amount from Medicaid recipients.⁹³ However, providers may not deny services to any individual based on such individual's inability to pay the copayment amount.⁹⁴ Thus the provider's ability to collect copayments for nonemergency services seems improbable at best.

There is also a new Medicaid reimbursement system for physicians and non-physician practitioners. The OMPP is empowered to establish fee schedules providing maximum allowable payment amounts for services and procedures covered under the Indiana Medicaid program for physicians, limited license practitioners⁹⁵ and non-physician practitioner⁹⁶ services.⁹⁷ The reimbursement for physicians and limited license practitioners is equal to the lower of submitted charges or the established fee schedule for such procedure.⁹⁸ The fee schedule is based on the Medicare relative value unit for an Indiana urban locality multiplied by the procedure's conversion factor established by OMPP.⁹⁹ Assistant surgeons are reimbursed using a different formula whereby payment is equal to twenty percent of the state-wide fee schedule for physicians and limited license practitioners.¹⁰⁰

2. *Rate Setting Criteria for Nursing Facilities.*—On August 1, 1994, a new rate-setting criteria for nursing facilities went into effect as promulgated by the Indiana Family and Social Services Administration (IFSSA) at Indiana Administrative Code Title 405, Rule 1-14 ("Rule 14"). It has had a dramatic impact on certain providers of nursing facility services under the Indiana Medicaid program.

89. *Id.*

90. *Id.* at r. 1-8-3(c).

91. *Id.* at r. 1-8-3(e).

92. *Id.* at r. 1-8-4(b).

93. *Id.* at r. 1-8-4(c).

94. *Id.* at r. 1-8-4(d).

95. Physician and limited license practitioner means a doctor of medicine, doctor of osteopathy, a physician group practice, a primary care group practice, an optometrist, a podiatrist, a dentist who is an oral surgeon, a chiropractor and a health service provider in psychology. *Id.* at r. 1-11.5-1(c).

96. Nonphysician practitioner means a physical therapist, an occupational therapist, a respiratory therapist, an audiologist, a speech therapist, a licensed psychologist, an independent laboratory or radiology provider, a dentist who is not an oral surgeon, certain social workers and psychologists, advance practice nurses, physician's assistants, and certain mental health professionals. *Id.* at r. 1-11.5-1(d).

97. *Id.* at r. 1-11.5-2.

98. *Id.* at r. 1-11.5-2(b).

99. *Id.* at r. 1-11.5-2(b)(1)(B).

100. *Id.* at r. 1-11.5-2(b)(5). The specific reimbursement formula for nonphysician practitioners is articulated at IND. ADMIN. CODE tit. 405, r 1-11.5-2(c) (1994).

Some of the more significant changes regarding Rule 14 involve the administrative appeal process available to facilities that contest Medicaid rates as established by IFSSA. For example, Medicaid rates can be implemented and overpayments can be recovered without awaiting the outcome of the administrative appeal process.¹⁰¹ Additionally, when a provider seeks a request for administrative reconsideration of its Medicaid rate, Medicaid is under no obligation to respond to the provider's request. If the rate-setting contractor does not respond within forty-five days, the request is deemed denied.¹⁰²

The changes also involve the information that must be submitted to the Indiana Medicaid program in the form of financial reports. The annual financial report is to be submitted to the office "not later than ninety (90) days after the close of the provider's reporting year."¹⁰³ Additionally, the annual report must include a statement of all expenses and all income, a complete balance sheet, and a schedule of Medicaid and private pay rates in effect on the last day of the reporting period and the rate effective date. The private pay charges are the lowest usual and customary charge.¹⁰⁴

With respect to interim rates, upon a change of provider or establishment of a new service, interim rates will be set at the greater of the prior provider's then current rate, or the fiftieth percentile. The fiftieth percentile rate will be calculated on a state-wide basis by level of care.¹⁰⁵ A change in provider status can also be rescinded if any subsequent transaction by the provider "cause[s] a capital lease to be reclassified as an operating lease."¹⁰⁶

Rate reviews for new providers will be submitted once a year based on the annual report. Budgets will no longer be submitted by providers. When determining rates for active providers, the state may consider changes in federal law or regulations during a calendar year when determining whether a rate increase will be allowed.¹⁰⁷ The state is under no obligation to revise a rate regardless of the scope of the federal or state law or impact that such law or regulation may have on the provider.

Rate setting shall be prospective based on allowable costs that will be determined by using the provider's historical expense information, and inflating the expense by the HCFA/SNF index. Expenses that will not be inflated include mortgage interest on facilities and equipment, depreciation of facilities and equipment, rent or lease costs for facilities and equipment, and working capital interest expense. The inflation adjustment will be applied "from the midpoint of the annual or historical financial report period to the midpoint of the expected rate period."¹⁰⁸

Allowable costs for certain fixed costs for nursing facilities will be subjected to initial minimal occupancy levels of ninety percent and ninety-five percent effective April 1, 1995, or the actual occupancy rate if higher. Target occupancy under the previous rules was eighty percent. Fixed costs subject to the minimum occupancy rate calculation

101. *Id.* at r. 1-14.1-1(d).

102. *Id.* at r. 1-14.1-25(a).

103. *Id.* at r. 1-14.1-4(a).

104. *Id.* at r. 1-14.1-4(b).

105. *Id.* at r. 1-14.1-5(a).

106. *Id.* at r. 1-14.1-5(h).

107. *Id.* at r. 1-14.1-6(b).

108. *Id.* at r. 1-14.1-7(a).

include director of nursing wages, administrative wages, all costs in the ownership cost center except for repairs and maintenance, and the capital return factor allowance.¹⁰⁹ Advertising is an allowable expense only when "incurred in the recruitment of facility personnel necessary for compliance with facility certification requirements."¹¹⁰

The provider's rate is based on recognition of the provider's allowable costs, plus a potential profit add-on. The rate is established at the lowest of the four limitations listed as follows:

1. Average allowable cost of the median patient day, by level of care and geographic area times 115%.
2. The rate paid by the general public for the same type of service.
3. The rate requested by the provider.
4. Inflated allowable costs plus the allowed profit add-on payment. The profit add-on is equal to 50% of the difference between the allowable costs and 100% of the average inflated allowable costs of the median patient day, by level of care and geographic area, with the profit add-on limited to 5% of the average inflated allowable costs of the median patient day, by level of care and geographic area.¹¹¹

Rule 14 is also important in that the provider's per diem rate now includes the costs of "nonroutine supplies" and oxygen, for which the bill could have been sent separately under the previous Medicaid rate-setting criteria.¹¹² Therapy services provided to Medicaid recipients are also included in the established per diem rate. Provider's costs for therapy will be included in the calculation of the rate and subsequent rate calculations, if the services satisfy conditions provided in the Indiana Medicaid Provider Manual.¹¹³ Therapy services can be provided through facility staff, licensed and certified therapists, or through a contractual arrangement.¹¹⁴

III. HEALTH CARE PROVIDER LAW

Several changes in Indiana law affect the activities of specific health care providers. The courts have addressed the issue of confidentiality of information within a peer review committee under the Indiana Peer Review Act. The General Assembly passed new legislation concerning hospital charity care, full-time physicians in hospitals, and an amendment to the Living Will Act. Finally, new rules were promulgated that affect advance practice nurses.

109. *Id.* at r. 1-14.1-7(b).

110. *Id.* at r. 1-14.1-8(a).

111. *Id.* at r. 1-14.1-9(a).

112. *Id.* at r. 1-14.1-22(a).

113. *Id.* at r. 1-14.1-23(a).

114. *Id.* at r. 1-14.1-23(b).

A. Judicial Opinions

In *Mulder v. Vankersen*,¹¹⁵ Mr. Vankersen was a certified registered nurse anesthetist and a non-physician member of the medical staff employed by St. Joseph Hospital of Huntingburg, Inc. ("Hospital"). In February 1992, a surgical technician made several reports to the director of the operating room that Mr. Vankersen had reported to work smelling of marijuana and that he suffered from mood swings. Mr. Mulder, the Hospital's chief executive officer, was ultimately apprised of Mr. Vankersen's alleged marijuana use.¹¹⁶

On May 20, 1992, at the medical staff's executive committee meeting, Mr. Vankersen's alleged marijuana use was discussed. The Hospital's executive committee consisted of five physician members and Mr. Mulder, the only non-physician member of the executive committee. No minutes of the May 20, 1992 meeting were kept.¹¹⁷

After the May 20, 1992 meeting of the executive committee, Mr. Vankersen was notified that his alleged marijuana use was discussed at the executive committee meeting. In response, Mr. Vankersen's attorney sent Mr. Mulder "a cease and desist" letter asking Mr. Mulder to stop making these accusations.¹¹⁸ After receiving the cease and desist letter, Mr. Mulder drafted a memorandum that detailed his communications regarding Mr. Vankersen to the executive committee at the May 20, 1992 meeting. The memorandum drafted by Mr. Mulder was not shown to anyone except Mr. Mulder's attorneys.¹¹⁹ Mr. Vankersen also discovered that Mr. Mulder had communications with a physician who was not a member of the executive committee regarding Vankersen's alleged marijuana use.

Mr. Vankersen thereafter filed a defamation action. In the process of discovery, Mr. Vankersen sought information discussed at the May 20, 1992 executive committee meeting as well as the memorandum prepared by Mr. Mulder in response to the cease and desist letter. All of the members of the executive committee invoked the peer review privilege¹²⁰ under the Indiana Peer Review Act ("Act")¹²¹ and refused to testify. Mr. Mulder similarly relied on the privilege in refusing to produce the memorandum.¹²²

In response to the executive committee members' invocation of the privilege, Mr. Vankersen sought a motion to compel from the trial court. The motion to compel was granted on the basis that: (1) the executive committee meeting was not a meeting of a peer review committee; (2) even if the meeting of the executive committee was a meeting of a peer review committee, the communications made at the meeting were not protected by the statute since the requirements for confidentiality were breached; and (3) the memorandum drafted by Mr. Mulder in response to the cease and desist letter was outside the scope of the Act. Mr. Mulder appealed.

115. 637 N.E.2d 1335 (Ind. Ct. App. 1994).

116. *Id.* at 1336.

117. *Id.*

118. *Id.*

119. *Id.* at 1336-37.

120. IND. CODE § 34-4-12.6-2 (1993).

121. *Id.* §§ 34-4-12.6-1 to -4.

122. *Mulder*, 637 N.E.2d. at 1337.

The court of appeals first determined whether the statements regarding Mr. Vankersen's alleged marijuana use made to the executive committee were communications made to a peer review committee pursuant to the Act. Under Indiana Code section 34-4-12.6-1(c), a "peer review committee" is

[a] committee having responsibility of evaluation of qualifications of professional health care providers, or of patient health care rendered by professional health care providers, or of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint. The committee must meet the following criteria:

- (1) The committee is organized:
....
(B) by the professional staff of a hospital . . . ;
- (2) At least fifty percent (50%) of the committee members are:
(A) individual professional health care providers, the governing board of a hospital or professional health care organization¹²³

The court of appeals determined that the Hospital's executive committee satisfied the requirements of a peer review committee since it had responsibility for evaluating the qualifications of the Hospital's health care providers and of the patient care rendered by professional health care providers as required by Indiana Code section 34-4-12.6-1(c).¹²⁴ Additionally, the executive committee met the requirement that it be organized by the professional staff of the Hospital with at least fifty percent of its members being individual professional health care providers. The court held that "the executive committee of the hospital was a peer review committee within the meaning of the statute and communications to the committee [were] within the scope of the peer review privilege and [were] entitled to protection."¹²⁵

The court then rejected Mr. Vankersen's arguments that: (1) the statements made to the executive committee were not within the scope of the Peer Review Act because they had no direct connection to an evaluation of patient care, and (2) because the executive committee did not take minutes at its May 20, 1992, meeting, the meeting was "stripped of the peer review privilege."¹²⁶ The court stated that because Mr. Vankersen was a registered nurse, the communications made to the executive committee regarding his alleged marijuana abuse had a direct effect on his ability to deliver patient care and, thus, were within the scope of the peer review privilege.¹²⁷ The court also stated that the failure to take minutes during the executive committee meeting did not change the peer review character of the communications and did not strip the communications of the privilege.¹²⁸

The court then briefly addressed whether Mr. Mulder's memorandum was protected by the peer review privilege. The court reasoned that the memorandum was protected on

123. *Id.* (quoting IND. CODE ANN. § 34-4-12.6-1(c) (West 1983 & Supp. 1994)).

124. *Mulder*, 637 N.E.2d at 1338-39.

125. *Id.* at 1339.

126. *Id.*

127. *Id.*

128. *Id.*

the basis that the "memorandum is simply a personal record of the communications in question, which we have determined are protected by the peer review privilege."¹²⁹ Therefore, the court held that the memorandum merely memorialized the privileged communications to the executive committee and was therefore protected under the Act.

Lastly, the court determined that Mr. Mulder's actions did not invalidate the privileges guaranteed under the Act by discussing Vankersen's alleged marijuana use with a physician who was not a member of the executive committee since that discussion related to the confidentiality provision of the statute and did not affect the privilege section. In holding that the privilege provisions had not been affected, the court relied upon the waiver provisions of the Act.¹³⁰ These provide that the peer review privilege may be waived only if the waiver is executed in writing. Without a written waiver, the peer review privilege is not waived even though some communications are outside of the peer review committee meeting.

The court rejected Mr. Vankersen's argument that the breach of the confidentiality provisions in the Act had caused a revocation of the privilege under the Act. Even though immunities under the Act shall be withheld from any person violating the confidentiality requirements therein, the same reasoning does not hold as to the privilege.¹³¹ Because the issue at hand revolved around waiver of the privilege as opposed to the immunities granted under the Act, the court found no waiver of the privilege because Mr. Mulder had not executed a written waiver.

B. Legislative Developments

1. *Charity Care.*—Effective July 1, 1994, Indiana requires that hospitals must document and report to the Indiana State Department of Health ("Department") the amount of charity care provided.¹³² Charity care is defined as the "unreimbursed cost to a hospital of providing, funding, or otherwise financially supporting health care services" to patients seeking medical services at such hospital.¹³³ Hospitals are required to file an annual community benefits report and a mission statement with the Department.¹³⁴

This statute could have considerable significance to Indiana nonprofit, tax-exempt hospitals as a measuring device to quantify whether such hospitals are continuing to satisfy their community and public service commitments through the provision of charitable care. This determination will be increasingly important as federal, state and local governments begin to examine the role of tax-exempt entities and the effect of those entities upon tax policy within various jurisdictions.

2. *Full-Time Physicians in Hospitals.*—Hospitals with at least 100 beds must have a physician on duty at all times.¹³⁵ The Department is authorized to promulgate rules that

129. *Id.*

130. *Id.* See IND. CODE § 34-4-12.6-2(g)-(i) (1993).

131. IND. CODE § 34-4-12.6-2(m) (1993).

132. The specific requirement is found at IND. CODE § 16-21-9-7(a) (1993 & Supp. 1994).

133. *Id.* § 16-18-2-52.5(a).

134. *Id.* § 16-21-9-7(a).

135. IND. CODE § 16-21-2-15 (1993 & Supp. 1994).

will establish procedures for hospital response to inpatient emergencies to ensure continuous coverage.¹³⁶

3. *Living Will Act.*—Effective July 1, 1994, the Living Will Act¹³⁷ no longer exempts the provision of appropriate nutrition and hydration from the term “life prolonging procedure.”¹³⁸ The living will declaration form¹³⁹ was also amended by the legislature to allow the patient to check one of the following three choices regarding the provision of artificially supplied nutrition or hydration:

- I wish to receive artificially supplied nutrition and hydration, even if the effort to sustain life is futile or excessively burdensome to me.
- I do not wish to receive artificially supplied nutrition and hydration, if the effort to sustain life is futile or excessively burdensome to me.
- I intentionally make no decision concerning artificially supplied nutrition and hydration, leaving the decision to my health care representative appointed under IC 16-36-1-7 or my attorney in fact with health care powers under IC 30-5-5.¹⁴⁰

The amendments to the Living Will Act do not apply to living will declarations executed prior to July 1, 1994.

Although these amendments to the Indiana Living Will Act are limited in number, the import of the changes is significant in that the General Assembly explicitly recognized that artificially supplied nutrition or hydration is a form of medical care. These changes bring the Living Will Act into accord with other statutes¹⁴¹ and with applicable Indiana case law.¹⁴²

4. *Medical Claims Review.*—In amending Indiana Code section 27-8-16-4, the General Assembly expanded the definition of “medical claims review agent” to include review entities or individuals who review amounts charged for health care services.¹⁴³ Whenever a medical claims review agent reviews and adjusts a medical bill, such agent must provide an explanation of the determination made, the database relied upon by the review agent in reaching such decision, and the percentile limiter applied to the amount charged by the health care provider. This law is designed to prevent arbitrary decisions by medical claims review agents with regard to the payment of medical claims.

5. *Charges Permitted for Providing Copies of Medical Records.*—Pursuant to Indiana Code section 16-39-1-1, a health care provider, upon the written request and with reasonable notice from a patient, was required to provide *at the provider’s actual total cost* a copy of the patient’s health record to the patient or the patient’s designee.

136. *Id.*

137. IND. CODE §§ 16-36-4-1 to -21 (1993 & Supp. 1994).

138. *Id.* § 16-36-4-1.

139. *Id.* § 16-36-4-10.

140. *Id.*

141. Indiana Health Care Consent Act, IND. CODE §§ 16-36-1-1 to -14 (1993); Indiana Powers of Attorney Act, IND. CODE §§ 30-5-5-1 to -10-4 (1993).

142. See *In re Lawrence*, 579 N.E.2d 32 (Ind. 1991).

143. IND. CODE § 27-8-16-4 (1993 & Supp. 1994).

Effective July 1, 1994, a provider is now limited with respect to the charges that can be assessed for providing copies of medical records. This new chapter states that “[a] provider may collect a charge of twenty-five cents (\$0.25) per page for making and providing copies of medical records.”¹⁴⁴ The provider is also entitled to collect a retrieval charge of fifteen dollars.¹⁴⁵ However, if the fifteen dollar retrieval charge is assessed, the provider may not charge for making and providing copies of the first ten pages of the medical record.¹⁴⁶ The provider may charge an additional fee of ten dollars if the provider is required to supply the person requesting the medical record a copy within two working days.¹⁴⁷

C. Administrative Action

1. *Revised Hospital Licensure Regulations.*—In early 1995, the Indiana State Department of Health (“Department”) issued new rules regarding the licensure of hospitals in Indiana.¹⁴⁸ These rules represent the first major state regulatory changes affecting hospital licensure in nearly two decades.

One of the most significant aspects of the new rules permits hospitals to establish policies and procedures for various hospital services. The Department will then confirm that the hospital’s policies and procedures are in place and evaluate adequacy for the services provided. The rules depart from a previous regulation that specified standards by each service area.

The new hospital licensure rules also seek to make the regulatory process more consistent with requirements of the Joint Commission for Accreditation of Healthcare Organizations (JCAHO)¹⁴⁹ and the Medicare Conditions of Participation.¹⁵⁰ Consistency with the national standards will allow a more uniform survey process for the purposes of regulatory evaluation and comparison.

Another part of the licensure rules changes the physical plant requirements for hospitals. Current rules dictate compliance with very specific physical plant standards. The new hospital rules have incorporated the American Institute of Architecture Guidelines (“AIA Guidelines”).¹⁵¹ The AIA Guidelines establish various building requirements for different types of hospital services, both inpatient and outpatient. The current rules have only one set of physical plant requirements that apply to all services and plant operations without regard to the type of service.

144. *Id.* § 16-39-9-3(a).

145. *Id.* § 16-39-9-3(b).

146. *Id.* § 16-39-9-3(a).

147. *Id.* § 16-39-9-3(d).

148. IND. ADMIN. CODE tit. 410, r. 15-1.1-1 to -1.7-1 (1994).

149. The JCAHO is a private accrediting organization that inspects hospitals for compliance with established accreditation guidelines for services provided by hospitals. Hospitals may voluntarily seek JCAHO accreditation. If a hospital is JCAHO-accredited, it is deemed to be in compliance with the Medicare Conditions of Participation.

150. 42 C.F.R. § 482 (1993).

151. IND. ADMIN. CODE tit. 410, r. 15-1.5-8 (1994).

The new rules also require twenty-four hour inpatient mandatory physician coverage in the hospital if it has more than 100 beds.¹⁵² The rules regarding the medical staff of hospitals require the staff to adopt and enforce bylaws and rules that include a provision of coverage for emergency care for all patients.¹⁵³ This provision of coverage for emergency care includes a definition of emergency care requiring a timely response by the on-duty physician.¹⁵⁴

These new rules afford Indiana hospitals the flexibility necessary to provide quality health care in a rapidly changing environment while remaining in compliance with licensure requirements.

2. *Advanced Practice Nurses.*—The new rules add to and clarify the definitions of "advanced practice nurse practitioner" and "clinical nurse specialist" and their standards of competent practice.¹⁵⁵ These definitions are based upon required additional skills and training. Most significant is the prescriptive authority given to an advanced practice nurse to prescribe legend drugs including controlled substances subject to certain requirements.

IV. FEDERAL DEVELOPMENTS

At the federal level, the Department of Justice and the Federal Trade Commission issued policy statements covering antitrust in the health care industry. A federal court in Virginia dealt with the issue of continuing medical treatment when such treatment is determined futile.

A. Antitrust

The rapid increase in health sector collaborative initiatives among competitors has been an integral part of the quiet revolution occurring in health care. Providers of health services require considerable guidance as to the permissible range of relationships and arrangements lawful under Federal antitrust law.

Some additional guidance is now forthcoming. On September 27, 1994, a year after their 1993 Policy Statements, the Department of Justice and the Federal Trade Commission ("Federal Agencies") issued an enlarged set of Policy Statements on the health care industry and antitrust, entitled "Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust" ("1994 Policy Statements").¹⁵⁶

Although in some instances virtually no difference exists between the 1993 and 1994 Policy Statements, the latter pronouncements are important because the Federal Agencies appear to have responded to the plea of the health care field that additional direction and clarification was necessary in structuring business arrangements. The identification by

152. *Id.* at r. 15-1.4-1(d)(3)(A).

153. *Id.* at r. 15-1.5-5(b)(3)(L).

154. *Id.*

155. IND. ADMIN. CODE tit. 848, r. 5-1-1 (1994).

156. U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION, STATEMENTS OF ENFORCEMENT POLICY AND ANALYTICAL PRINCIPLES RELATING TO HEALTH CARE AND ANTITRUST (1994) [hereinafter "1994 POLICY STATEMENTS"].

the federal agencies of certain safety zones in areas such as sharing of equipment and services, creation of multi-provider networks and the dissemination of fee-related information provides some encouragement that the complexities of the health care industry are being recognized and some accommodation of usual policy may occur.

The 1994 Policy Statements include guidance in the following areas: (1) mergers among hospitals; (2) hospital joint ventures utilizing high technology or other expensive health care equipment; (3) hospital joint ventures involving specialized clinical or other expensive health care services; (4) providers' collective provision of non-fee-related information to purchasers of health care services; (5) providers' collective provision of fee-related information to the purchasers of health care services; (6) provider participation in exchange of price and cost information; (7) joint purchasing arrangements among health care providers; (8) physician network joint ventures; and (9) analytical principles regarding multiprovider networks.¹⁵⁷

The 1994 Policy Statements appear to be particularly useful in the expansion of established safety zones. Hospital joint equipment ventures may now include existing equipment as well as newly purchased equipment, so long as "the joint venture includes only the number of hospitals whose participation is needed to support the equipment."¹⁵⁸ Interestingly, the federal agencies have never challenged a joint venture among hospitals to purchase health care equipment or services.¹⁵⁹ In developing physician network ventures, the Policy Statements allow a twenty percent market share threshold for exclusive ventures and thirty percent share for non-exclusive physician network joint ventures sharing meaningful financial risk.¹⁶⁰

In addition to the antitrust safety zones, the 1994 Policy Statements also provide insight into the analytical process used by the federal agencies in evaluating efficiencies created by joint ventures.¹⁶¹ The issuing agencies also renewed their commitment to reply to inquiries for guidance within ninety days of the provision of all necessary information and material related to the 1994 Policy Statements, except for mergers outside the safety zone and multi-provider networks, which will require 120 days response time.¹⁶²

The 1994 Policy Statements are important aids to providers as they structure their business affairs in the sometimes confusing and contradicting areas of competition and collaboration. Providers now have additional guideposts and an element of certainty that has eluded them in the past. There is a greater likelihood that most arrangements as described by the 1994 Policy Statements fostering competition and lower costs will be viewed favorably.

B. Consent

1. *Continuation of Treatment Determined Futile.*—Although the doctrine of informed consent was developed to ensure that patients had complete information prior

157. 1994 POLICY STATEMENTS, *supra* note 156, at 2-3.

158. 1994 POLICY STATEMENTS, *supra* note 156, at 17.

159. 1994 POLICY STATEMENTS, *supra* note 156, at 16.

160. 1994 POLICY STATEMENTS, *supra* note 156, at 68-69.

161. 1994 POLICY STATEMENTS, *supra* note 156, at 35-43.

162. 1994 POLICY STATEMENTS, *supra* note 156, at 106.

to making important decisions regarding medical care and treatment,¹⁶³ that doctrine has, through a recent Fourth Circuit Court of Appeals decision, evolved to the point that the clinical judgment of the physician may in certain cases be secondary to a patient's or a patient representative's demand for medically inappropriate care.

In *In re Baby K.*,¹⁶⁴ a hospital brought an action for declaratory and injunctive relief under four federal statutes and one state statute. The statutes were the Emergency Medical Treatment and Active Labor Act (EMTALA),¹⁶⁵ the Americans with Disabilities Act of 1990 (ADA),¹⁶⁶ the Rehabilitation Act of 1973 (RA),¹⁶⁷ the Child Abuse Amendments of 1984,¹⁶⁸ and the Virginia Medical Malpractice Act.¹⁶⁹

The plaintiff acute care hospital was a Medicare and Medicaid participating hospital under 42 U.S.C. § 1395cc, licensed in Virginia to provide full medical and hospital services, and staffed by a complete complement of physicians, including several pediatric specialists that frequently treated sick children.¹⁷⁰ Ms. H., the defendant, was a citizen of Virginia and the biological mother of Baby K. Baby K. was born on October 13, 1992, with anencephaly, a congenital defect in which the brain stem is formed but the cerebral cortex is absent or quite underdeveloped. No known treatment will reverse, modify, cure or otherwise improve this condition. Because the cerebral cortex contains centers of high brain function, Baby K. was unconscious, could neither see nor hear and probably could not feel pain. Baby K.'s primary functions were limited to reflex actions controlled by the brain stem such as feeding reflexes, respiratory reflexes and response to sound or touch. Most of Baby K.'s other organs and body functions appeared normal. Generally, most anencephalic infants die within a few days of birth.¹⁷¹

Because of breathing problems, immediately upon birth, Baby K. was placed on a mechanical ventilator to assist in breathing. Several days later, hospital personnel requested that Ms. H. authorize a "Do Not Resuscitate Order" for Baby K., which would include the discontinuation of ventilator treatment. The doctors informed Ms. H. that the ventilator treatment was "medically unnecessary and inappropriate"; however, she refused to authorize the Do Not Resuscitate Order and continued to request ventilator treatment for Baby K.¹⁷² With Ms. H.'s consent, the hospital thereafter transferred Baby K. to a nursing home during a period of respiratory stability for Baby K. Ms. H.'s consent was subject to the hospital's agreement to readmit Baby K. and provide ventilator treatment in the event Baby K. encountered future respiratory distress. Approximately six weeks later, Baby K. was returned to the hospital after experiencing respiratory distress. Ms. H. insisted on ventilator treatment even though hospital officials again sought to dissuade

163. See *Payne v. Marion Gen. Hosp.*, 549 N.E.2d 1043, 1046 (Ind. Ct. App. 1990).

164. 832 F. Supp. 1022 (E.D. Va. 1993), *aff'd*, 16 F.3d 590 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 91 (1994).

165. 42 U.S.C. § 1395dd (1988 & Supp. 1993).

166. 42 U.S.C. § 12101 (Supp. 1993).

167. 29 U.S.C. § 794 (1988 & Supp. 1993).

168. The Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5106h (1988 & Supp. 1993).

169. VA. CODE §§ 8.01-581.1 to 581.20 (1992 & Supp. 1994).

170. *In re Baby K.*, 832 F. Supp. at 1024.

171. *Id.*

172. *Id.* at 1025.

her. After stabilization, Baby K. was again transferred to the nursing home where she continued to live at the time of trial.

The hospital, expecting future episodes of respiratory distress for Baby K., brought this action and made a motion for appointment of a guardian ad litem, which was granted by the court. The hospital also stipulated to the court that its request to deny ventilator treatments to Baby K. was not related to Ms. H.'s ability to pay. The guardian ad litem supported the position of the hospital as to withholding ventilator treatment from Baby K.¹⁷³

The district court held for Ms. H. in all respects, ruling that the hospital is required under EMTALA to provide necessary and appropriate emergency care to Baby K. and such stabilizing care as is necessary.¹⁷⁴ The district court also stated that the EMTALA had no "futile case" exception and, even if it did, providing ventilator care relieved the acute symptom of breathing difficulty, which is an emergency condition requiring treatment irrespective of the underlying medical condition.¹⁷⁵ The district court further found that the RA also required the hospital to provide emergency care in this case because Baby K. had a handicapping condition and was otherwise qualified to receive medical care.¹⁷⁶ Withholding of necessary ventilator treatment because of her handicap, anencephaly, would therefore violate the RA. The district court concluded that the ADA would also be violated by withholding ventilator treatment for Baby K. because the hospital was a place of public accommodation, and the plain language of the statute compels treatment in this case because an infant without an anencephalic condition in respiratory distress would receive ventilator treatment if consented to by the parent.¹⁷⁷

The Fourth Circuit Court of Appeals affirmed the district court by a two-to-one majority.¹⁷⁸ The majority held that the hospital had a duty to provide stabilizing treatment under EMTALA.¹⁷⁹ The majority had little difficulty in finding that EMTALA unequivocally obligated the hospital to provide emergency care to Baby K. while she was in respiratory distress. They did, however, acknowledge that the decision placed physicians in a dilemma since the plain language of EMTALA requires treatment in these types of cases even if it is contrary to accepted medical standards.¹⁸⁰ The majority concluded that the legislative branch of government must resolve this problem, not the judicial branch.¹⁸¹ The majority, because it was "bound to interpret federal statutes in accordance with their plain language,"¹⁸² apparently read literally the application of EMTALA and found no exception for independent medical judgment. It also failed to distinguish between the manifest medical emergency (respiratory distress) and the indisputable cause and related underlying medical condition (anencephaly).

173. *Id.* at 1025-26.

174. *Id.* at 1027.

175. *Id.*

176. *Id.* at 1028.

177. *Id.*

178. 16 F.3d 590, 598 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 91 (1994).

179. *Id.* at 595.

180. *Id.* at 597.

181. *Id.* at 598.

182. *Id.*

If this Fourth Circuit decision gains currency, physicians in many jurisdictions could be compelled to provide medical treatment inconsistent with their best medical judgment because transferring such a patient will not always be an option. The welfare of the patient is not always well served by prolonging the patient's death by any and all means. Federal statutes seeking to ensure availability of emergency care, access to care for handicapped persons and the protection of children should be re-examined to determine whether modifications are necessary to restore the concept of providing all persons necessary care as determined primarily by medical judgment and appropriate consent. Indiana attorneys advising hospitals and physicians should be aware of this important development in the Fourth Circuit.

CONCLUSION

As the public becomes accustomed to the precept that only finite resources exist for all necessary services, including the delivery of health care, significant choices must be made as to the services to be provided, the populations to be served, and the most efficient and cost-effective methods of delivering care. This decision-making process will result in a confluence of fiscal, political, moral and legal forces. Members of the legal profession have an important role and opportunity to provide leadership in assuring that these difficult decisions affecting basic human needs are rooted in principles of fairness embodied in the rule of law.

1994 DEVELOPMENTS IN INDIANA APPELLATE PROCEDURE: OLD LESSONS REVISITED AND THE SCOPE OF THE COURT OF APPEALS' DISCRETION

WILLIAM O. HARRINGTON*

INTRODUCTION

During 1994, Indiana appellate practice stayed its course. The Indiana Rules of Appellate Procedure received only minor amendments. The reported decisions from Indiana's appellate courts more often reminded appellate practitioners of the old but critical lessons that attend careful appellate practice, and only occasionally developed new law. The most interesting development in the case law relates to a vigorous debate among three districts of the Indiana Court of Appeals regarding the extent of the appellate courts' inherent authority to entertain appeals from administrative agency decisions wherein the appellant fails to include an assignment of errors in the record of proceedings.¹

The composition of Indiana's appellate tribunals continues to evolve. However, at least in 1994, the case law did not offer much new guidance to the appellate practitioner. As it turns out, 1994 was an important year to revisit the lessons of the past. With so many potential developments looming on the horizon, it is perhaps best that 1994 was a year to stand relatively still and think critically about the current status of appellate procedure in Indiana.

Part I of this Article discusses briefly the minor amendments to the Indiana Rules of Appellate Procedure in 1994. Part II analyzes the decisions of Indiana's appellate courts in 1994 which revisit and emphasize the old lessons of appellate practice. Part III examines the debate regarding the significance of failing to make an assignment of errors and the larger implications of that debate. Part IV discusses what may lie ahead in 1995.

I. AMENDMENTS TO THE INDIANA RULES OF APPELLATE PROCEDURE

The Indiana Supreme Court made only minor changes to the Indiana Rules of Appellate Procedure in 1994. Most of the amendments that became effective in 1994 were thoroughly reviewed in last year's Survey article on Indiana Appellate Procedure.²

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1. *St. Amand-Zion v. Review Bd. of Ind.*, 635 N.E.2d 184, 185 (Ind. Ct. App. 1994) (holding that the “[f]ailure to file the assignment of errors must result in dismissal for lack of jurisdiction.”); *Claywell v. Review Bd. of Ind.*, 635 N.E.2d 181, 182 (Ind. Ct. App. 1994), *aff'd*, 643 N.E.2d 330 (Ind. 1994) (holding that “[t]he timely filing with this court of an assignment of errors . . . is a jurisdictional act.”); *Hogan v. Review Bd. of Ind.*, 635 N.E.2d 172, 174 (Ind. Ct. App. 1994) (holding that the requirement of filing an assignment of errors has been abolished).

2. George T. Patton, Jr., *1993 Developments in Indiana Appellate Procedure: Changes in Original Actions, Rehearing and Transfer*, 27 IND. L. REV. 843, 844-53 (1994) (discussing the amendments to the rules regarding original actions, petitions for rehearing and transfer, interlocutory appeals from the Tax Court, and shorter statements of the case).

One other substantive amendment in 1994 was the addition of the Civil Rights Commission to the list of specifically enumerated state agencies in Indiana Appellate Rule 4(C) over which the Indiana Court of Appeals has jurisdiction to review final decisions.³ In addition, Indiana Appellate Rule 8.2(B)(2) was amended to add the proper citation form for reference in briefs to the Indiana Rules of Evidence.⁴

II. OLD LESSONS REVISITED: IMPORTANT 1994 DECISIONS ON INDIANA APPELLATE PROCEDURE

In a series of 1994 decisions,⁵ the Indiana Court of Appeals and the Indiana Supreme Court reminded appellate practitioners about some of the critical principles that attend good appellate practice in Indiana. This section discusses several of those cases as they relate to the preservation of error, various waiver concerns, the *prima facie* error rule, and summary judgment practice.

A. Preserving Error

Nothing is more fundamental to appellate practice than the preservation of error. This principle is clearly illustrated in two recent decisions by the Indiana Court of Appeals.

In *Carter v. State*,⁶ Defendant Carter's counsel filed a pretrial motion in limine to exclude anticipated testimony by the State's witnesses regarding Carter's alleged prior bad acts.⁷ The trial court denied Carter's motion in limine, and Carter's counsel then requested that a continuing objection be noted on the record.⁸ When the trial court admitted the testimony that was the subject of Carter's motion in limine, Carter's counsel made no further objection.⁹ The court of appeals held that "[w]hile we approve the use of continuing objections, they are insufficient to preserve error for appeal. Carter should have renewed his objection at trial when the testimony was offered. Having failed to timely renew his objection, he waived this allegation of error."¹⁰ As the court of appeals observed, "[i]t is well-settled that 'when a defendant does not properly bring an objection to the trial court's attention so that the trial court may rule on it at the appropriate time, he is deemed to have waived that possible error.'"¹¹

Trout v. Trout offered an equally significant example of the risk of "sitting idly by."¹² *Trout* was a marital dissolution case. The trial court implemented a summary final dissolution hearing procedure. Under that procedure, counsel summarized their clients'

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3. IND. APP. R. 4(C).
 4. IND. APP. R. 8.2(B)(2).
 5. This Article addresses appellate decisions from November 1, 1993, through October 31, 1994.
 6. 634 N.E.2d 830 (Ind. Ct. App. 1994).
 7. *Id.* at 832.
 8. *Id.*
 9. *Id.*
 10. *Id.* at 833 (citing *Hobson v. State*, 495 N.E.2d 741, 744 (Ind. Ct. App. 1986)).
 11. *Carter v. State*, 634 N.E.2d 830, 833 (Ind. Ct. App. 1994) (quoting *Ingram v. State*, 547 N.E.2d 823, 829 (Ind. 1989)).
 12. 638 N.E.2d 1306 (Ind. Ct. App. 1994).

testimony, and then the parties verified that the statements made by their counsel were in fact accurate summaries of the testimony that they would have offered.¹³ Exhibits were entered into evidence by agreement.¹⁴ Neither party objected to this procedure before or during the final hearing. After receiving the trial court's ruling, the husband filed a motion to correct error challenging the summary procedure.¹⁵ On appeal, the court of appeals held:

[A]ny challenges to the procedure utilized by the trial court were waived by Husband's failure to object to the format of the proceedings. A timely objection is a prerequisite to appellate review. "An appellant cannot sit idly by without objecting, await the outcome of trial, and thereafter raise an issue for the first time on appeal."¹⁶

In the realm of appellate practice, one who hesitates has truly lost the opportunity to seek appellate review. Where error is not timely preserved by objection, there simply is no reviewable error.¹⁷ That lesson is the first and perhaps the most important of the old lessons revisited in 1994.

B. Other "Waiver" Concerns

In addition to the critical importance of preserving error, the appellate courts discussed several other waiver issues on appeal. Foremost among these decisions were cases regarding dismissal for failure to file a timely praecipe,¹⁸ waiver of issues that are raised for the first time on appeal,¹⁹ waiver due to failure to address issues in the argument section of appellant's brief,²⁰ potential waiver arising from failure to present a narrative statement of facts,²¹ and waiver of issues raised for the first time in the reply brief.²² The Indiana Court of Appeals also reminded appellate practitioners that some matters, particularly subject matter jurisdiction,²³ cannot be waived.

Indiana Appellate Rule 2(A) provides, in relevant part, that "[t]he praecipe shall be filed within thirty (30) days after entry of a final judgment Unless the praecipe is

13. *Id.* at 1307.

14. *Id.*

15. *Id.*

16. *Id.* (citing *Archem, Inc. v. Simo*, 549 N.E.2d 1054, 1060 (Ind. Ct. App. 1990) and quoting *Cheek v. State*, 567 N.E.2d 1192 (Ind. Ct. App. 1991)).

17. See also *Levin v. Levin*, 626 N.E.2d 527, 531 (Ind. Ct. App. 1993), *aff'd*, 645 N.E.2d 601 (Ind. 1994) (explaining that "[g]enerally, the failure to raise errors which existed at trial may not be remedied in a post trial motion to correct error").

18. *Jennings v. Davis*, 634 N.E.2d 810 (Ind. Ct. App. 1994).

19. *Johnson v. Owens*, 639 N.E.2d 1016 (Ind. Ct. App. 1994).

20. *Hopping v. State*, 627 N.E.2d 875 (Ind. Ct. App. 1994), *cert. denied*, 115 S. Ct. 578 (1994); *J.C. Harbour v. Bob Anderson Pontiac*, 624 N.E.2d 475 (Ind. Ct. App. 1993).

21. *Levi v. State*, 627 N.E.2d 1345 (Ind. Ct. App. 1994).

22. *Hefty v. All Other Members Cert. Settlement*, 638 N.E.2d 1284 (Ind. Ct. App. 1994); *Mid State Bank v. 84 Lumber Co.*, 629 N.E.2d 909 (Ind. Ct. App. 1994).

23. *Albright v. Pyle*, 637 N.E.2d 1360 (Ind. Ct. App. 1994). See also *Coachmen Vans v. State Bd. of Tax Comm'rs*, 639 N.E.2d 1066 (Ind. Tax Ct. 1994).

filed within such time period, the right to an appeal will be forfeited.”²⁴ In 1994, the court of appeals provided another fitting example of the blunt significance of this rule. In *Jennings v. Davis*,²⁵ the trial court entered final judgment on August 16, 1993, and the defendant’s counsel filed his praecipe on September 16, 1993.²⁶ Since August has thirty-one days, the praecipe was filed one day late. The court of appeals held that “[t]imely filing of a praecipe is a jurisdictional prerequisite and when the praecipe has not been timely filed we *must* dismiss the appeal.”²⁷ Interestingly, Judge Rucker dissented,²⁸ declaring that the court of appeals has the inherent discretion to entertain untimely appeals and observing:

In the case at hand appellant was merely one day late in filing his praecipe. The Record of Proceedings and Brief of Appellant were timely filed thereafter. I also observe that the appellee did not file a brief. Invoking a procedural rule in this case defeats rather than promotes the ends of justice. We would prejudice no one by entertaining the merits of this appeal.²⁹

Once an appeal is timely perfected, the appellate courts will only consider the issues raised by the parties.³⁰ However, issues raised for the first time on appeal will not be considered.³¹ In *Johnson v. Owens*, the plaintiffs pursued a negligent entrustment claim arising from an auto accident. On appeal, the plaintiffs/appellants argued for the first time that Indiana should adopt Section 390 of the *Restatement (Second) of Torts*, under which plaintiffs would not have been required to prove actual knowledge in order to succeed in their negligent entrustment claim.³² The Indiana Court of Appeals rejected this novel argument, holding that “[t]he general rule . . . is that ‘a party may not raise an issue on appeal which was not raised in the trial court. . . . This rule also applies to summary judgment proceedings.’ The argument is waived.”³³

Indiana Appellate Rule 8.3(A)(7) provides, in relevant part:

Each error that appellant intends to raise on appeal shall be set forth specifically and followed by the argument applicable thereto. . . . The argument shall contain the contentions of the appellant with respect to the issues presented, the reasons in support of the contentions along with citations to the authorities,

24. IND. APP. R. 2(A).

25. 634 N.E.2d 810 (Ind. Ct. App. 1994).

26. *Id.*

27. *Jennings*, 634 N.E.2d at 810 (citing CNA Ins. Cos. v. Vellucci, 596 N.E.2d 926, 928 (Ind. Ct. App. 1992)) (emphasis added).

28. *Id.* at 811.

29. *Id.* This theme regarding the appellate court’s discretion is analyzed in greater detail in Part III of this Article.

30. *In Re Buck Creek Coal, Inc.*, 639 N.E.2d 668, 671 n.2 (Ind. Ct. App. 1994) (“Buck Creek has presented no argument on this exception [*i.e.*, the public interest exception to the mootness rule], and therefore, we will not consider it further.”).

31. *Johnson v. Owens*, 639 N.E.2d 1016 (Ind. Ct. App. 1994).

32. *Id.* at 1022 n.5.

33. *Id.* (quoting *Hardiman v. Governmental Ins. Exchange*, 588 N.E.2d 1331 (Ind. Ct. App. 1992)).

statutes, and parts of the record relied upon, and a clear showing of how the issues and contentions in support thereof relate to the particular facts of the case under review.³⁴

In *J.C. Harbour v. Bob Anderson Pontiac*,³⁵ the Indiana Court of Appeals held that an issue had been waived when it was identified in the “Statement of the Issues” section of appellant’s brief, but not addressed in the “Argument” section of the brief.³⁶ Similarly, in *Hopping v. State*,³⁷ the court of appeals held that several issues were waived when defendant failed to support the issues with any argument or citation to authority.³⁸

Appellate Rule 8.3(A)(5) requires “[a] statement of the facts relevant to the issues presented for review, with appropriate references to the record.”³⁹ In *Levi v. State*,⁴⁰ the appellant’s statement of facts consisted of a summary of each witness’s trial testimony.⁴¹ The court of appeals admonished appellant’s counsel, stating:

We have repeatedly stated that the appellate rules contemplate a narrative statement of the facts; a witness by witness summary of the testimony is not a statement of facts within the meaning of [Indiana] Appellate Rule 8.3(A)(5). We admonish counsel that failure to abide by the rules of procedure may result in waiver of issues presented for review.⁴²

Not only must arguments be properly raised in appellant’s brief, but an issue cannot be raised for the first time in appellant’s reply brief.⁴³ In *Mid State Bank v. 84 Lumber Co.*, the defendant appealed the trial court’s entry of summary judgment in favor of the plaintiff in a breach of contract case. In its reply brief, the defendant argued for the first time that the trial court’s summary judgment was unsupported by the evidence and contrary to law.⁴⁴ The court of appeals held that “[t]he law is well settled that grounds for error can only be framed in the appellant’s initial brief and if addressed for the first time in the reply brief, they are waived.”⁴⁵ Curiously, however, the court of appeals went on to say that “despite waiver we may review the issue if the noncompliance with the

34. IND. APP. R. 8.3(A)(7).

35. 624 N.E.2d 475 (Ind. Ct. App. 1993).

36. *Id.* at 476 n.1.

37. 627 N.E.2d 875 (Ind. Ct. App. 1994), *cert. denied*, 115 S. Ct. 578 (1994).

38. *Id.* at 876 n.2.

39. IND. APP. R. 8.3(A)(5).

40. 627 N.E.2d 1345 (Ind. Ct. App. 1994).

41. *Id.* at 1347 n.2.

42. *Id.* (citing *Hoover v. State*, 582 N.E.2d 403 (Ind. Ct. App. 1991), *aff’d*, 589 N.E.2d 243 (Ind. 1992)).

43. *Mid State Bank v. 84 Lumber Co.*, 629 N.E.2d 909 (Ind. Ct. App. 1994); *see also Hefty v. All Other Members Cert. Settlement*, 638 N.E.2d 1284 (Ind. Ct. App. 1994).

44. *Mid State Bank*, 629 N.E.2d at 911 n.1.

45. *Id.* (citing IND. APP. R. 8.3(A)(7) and *Saloom v. Holder*, 307 N.E.2d 890 (Ind. App. 1974)). *See also Hefty*, 638 N.E.2d at 1288 n.4.

Appellate Rules does not impede our review.”⁴⁶ The court chose to review the waived issue.

Finally, while many issues on appeal can be waived by conduct, the appellate courts were quick to remind practitioners in 1994 that certain matters cannot be waived. Most notably, the subject matter jurisdiction of the trial court can be raised at *any* time in a case.⁴⁷ In fact, “[i]f the parties do not question it, the trial court or Court of Appeals is required to consider the issue *sua sponte*.⁴⁸

For both appellants and appellees, avoiding the catastrophe of waiver can be like “tiptoeing through a minefield,” especially when the decisions of the appellate courts *excusing* waiver are reviewed. The powerful defense of waiver is sometimes, and without any apparent consistency, cast aside by the prerogative of the appellate judges. On balance, however, the rules regarding waiver are known and predictable. A careful review of the decisions discussed above should assist all appellate practitioners in avoiding the wrath of waiver and focusing the appellate court on the merits of their appellate arguments.

C. *The Prima Facie Error Rule*

During 1994, the Indiana Court of Appeals continued to develop the “prima facie error” rule.⁴⁹ The “prima facie error” rule is a less rigorous standard of review under which the appellate courts have the discretion to reverse if the appellee files no brief and the appellant’s brief demonstrates prima facie error.⁵⁰ The court of appeals has observed that “[t]his rule was established for the protection of the court so that it might be relieved of the burden of controverting the arguments advanced for reversal where such a burden rests with the appellee.”⁵¹ In *Head v. State*, however, the court of appeals further held that “we are not compelled to apply the prima facie error standard but may, in our discretion, decide the case on the merits.”⁵² The court chose to address this appeal on the merits.

When will the appellate courts apply the prima facie error rule? In light of *Head v. State*, it is unpredictable. When the appellate courts elect to exercise their inherent discretion to review an appeal on the merits, the absence of appellee’s brief may have no effect. There is, however, no principled reason to take this risk. The lesson of 1994 is that only one practice makes sense: Appellees should always file a brief. Appellees who fail to do so run the risk that their successes in the trial court will be the subject of a diluted standard of review on appeal.

46. *Mid State Bank*, 629 N.E.2d at 911 n.1. This theme regarding the appellate court’s discretion is analyzed in greater detail in Part III of this Article.

47. *Albright v. Pyle*, 637 N.E.2d 1360, 1363 (Ind. Ct. App. 1994); *Coachmen Vans v. State Bd. of Tax Comm’rs*, 639 N.E.2d 1066, 1067 (Ind. Tax Ct. 1994).

48. *Albright*, 637 N.E.2d at 1363.

49. *Weinberg v. Bess*, 638 N.E.2d 841 (Ind. Ct. App. 1994); *Head v. State*, 632 N.E.2d 749 (Ind. Ct. App. 1994); *Phegley v. Phegley*, 629 N.E.2d 280 (Ind. Ct. App. 1994).

50. *Weinberg*, 638 N.E.2d at 843 (citing *Beck v. Mason*, 580 N.E.2d 290, 291 (Ind. Ct. App. 1991)).

51. *Head*, 632 N.E.2d at 750 (citing *Dusenberry v. Dusenberry*, 625 N.E.2d 458, 460 (Ind. Ct. App. 1993)). *See also Phegley*, 629 N.E.2d at 282.

52. *Head*, 632 N.E.2d at 750.

D. Summary Judgment Practice

Since the amendment of Trial Rule 56(C), effective January 1, 1991, the appellate courts have rendered a raft of decisions regarding summary judgment practice in Indiana.⁵³ Many of those decisions have related to the standard for appellate review. The reported decisions in 1994 have continued the evolution of summary judgment practice on appeal in Indiana.

As has long been known, the court of appeals applies the same standard as the trial court in reviewing a summary judgment motion.⁵⁴ The only variance between the trial court standard and the appellate standard is that the losing party in the trial court has the added burden of persuading the appellate court that the trial court's decision was erroneous.⁵⁵

In 1991, Trial Rule 56(C) was amended to add the following requirement:

At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto.⁵⁶

Subsequent to that amendment, the court of appeals has held that it "may consider only those parts of the record which have been designated by the parties in the motion or response. . . . [W]e, as a reviewing court, are no longer free to search the entire record to support the judgment of the trial court."⁵⁷ During 1994, the court of appeals fine-tuned its position with respect to what constitutes a proper designation of evidence. In *Holland v. Miami Systems, Inc.*, the court of appeals observed that "[d]esignating the entire record may be considered as failing to make the designation."⁵⁸

The court of appeals has become very specific in its enunciation of the requirements of Trial Rule 56(C):

Although [Trial Rule] 56(C) is silent as to the specificity required for designations, this Court in *Pierce* explained that a proper designation consists

53. See, e.g., *Pierce v. Bank One—Franklin*, NA, 618 N.E.2d 16, 19 (Ind. Ct. App. 1993) (explaining that the purpose of the amendments to IND. TRIAL R. 56 is to decrease the amount of evidentiary material trial courts are required to sift through in ruling on summary judgment motions); *Midwest Commerce Banking Co. v. Livings*, 608 N.E.2d 1010, 1012 (Ind. Ct. App. 1993) (holding that neither the trial court nor the court of appeals can look beyond the evidence specifically designated to the trial court).

54. *Holland v. Miami Systems, Inc.*, 624 N.E.2d 478, 482 (Ind. Ct. App. 1994) (citing *Inland Steel v. Pequignot*, 608 N.E.2d 1378, 1381 (Ind. Ct. App. 1993)).

55. *Schrader v. Eli Lilly & Co.*, 639 N.E.2d 258, 261 (Ind. 1994) (citing *Oelling v. Rao*, 593 N.E.2d 189 (Ind. 1992)). The review is not de novo. Summary judgments enter the process of appellate review cloaked with a presumption of validity. *Indiana Dep't of State Revenue v. Bethlehem Steel Corp.*, 639 N.E.2d 264, 266 (Ind. 1994).

56. IND. TRIAL R. 56(C).

57. *Holland*, 624 N.E.2d at 482-83.

58. *Id.* at 483.

of: (1) a list of the factual matters which are or are not in dispute, (2) supported by a specific designation to their location in the record, and (3) a brief synopsis of why those facts are material.⁵⁹

In an effort to make this standard even more clear, the court of appeals recently stated in *National Board of Examiners v. American Osteopathic Ass'n*:

Specifically, we have held that a general reference to whole portions of the record, without a specific citation to relevant evidence does not constitute designation under Trial Rule 56(C). Our decisions in this regard have been numerous and our holdings unmistakable, yet we continue to receive cases on appeal in which the attorneys have not properly designated evidence.⁶⁰

Since the court of appeals cannot reverse on the grounds that there is a genuine issue of material fact unless the relevant evidence has been specifically designated and since no specific designation was made in *American Osteopathic*, the court of appeals affirmed.⁶¹

Indiana's appellate courts made substantial strides in the development of appellate summary judgment procedure during 1994. Prudent practitioners should consult these most recent pronouncements before preparing their next motion for summary judgment. The court of appeals is presently wielding a rather heavy axe where the designation of evidence is not appropriately precise.⁶² Take heed.⁶³

59. *Kissell v. Vanes*, 629 N.E.2d 878, 880 (Ind. Ct. App. 1994) (citing *Pierce v. Bank One—Franklin, NA*, 618 N.E.2d 16, 19 (Ind. Ct. App. 1993)).

60. 639 N.E.2d 317, 319 (Ind. Ct. App. 1994) (citation omitted).

61. *Id.*; see also IND. TRIAL R. 56(H).

62. See, e.g., *American Osteopathic*, 639 N.E.2d at 319 (stating that appellee's "superficial effort to comply with Trial Rule 56(C) is intolerable and is not only contemptuous of the intent of the rule, but also to the courts of Indiana"). The suggestion of contempt certainly seems harsh. Why not simply state that the designation is inadequate under IND. TRIAL R. 56(C) and deny the motion for summary judgment?

63. As this Article was going to print, the Indiana Court of Appeals rendered its decision in *National Bd. of Examiners v. American Osteopathic Ass'n*, 645 N.E.2d 608 (Ind. Ct. App. 1994), vacating its prior decision. See *supra* note 61. In the new decision, the court of appeals relaxed its observation somewhat, holding:

Some of our earlier holdings suggest that the evidentiary materials must be designated in a certain manner. However, we believe the language of the rule itself permits the parties to determine how to designate. What the rule requires is specificity, and we do not mean to suggest that we are relaxing that requirement. [IND. TRIAL R. 56(H)] prohibits this court from reversing a case because there is a genuine issue of material fact unless that fact has been "specifically designated" to the trial court. Thus, specificity is the mandate, and we agree with those cases which have held that the failure to make specific citations does not comply with the rule. Our holding is simply that how a party is to specifically designate material is not mandated by the rule.

American Osteopathic, 645 N.E.2d at 615 (citations omitted). The court of appeals then found that the parties' "designations" sufficiently apprised the trial court. *Id.* at 616.

III. THE SCOPE OF THE COURT OF APPEALS' DISCRETION

Three 1994 decisions by three separate districts of the Indiana Court of Appeals place a special focus on the extent to which the appellate courts may either strictly apply the Indiana Rules of Appellate Procedure or assert their apparently inherent authority to disregard the clear import of the Rules on an ad hoc basis.⁶⁴ The debate among the districts is significant in and of itself as well as because of its larger implications.

A. *The Debate*

Appellate Rule 7.2(A)(1) provides:

The record of the proceedings shall consist of the following documents:

(1) A copy of the praecipe and where used a copy of the Motion to Correct Error or an assignment of errors for reviews from administrative decisions taken directly to the Court of Appeals under Appellate Rule 4(C).⁶⁵

Furthermore, Indiana Code section 22-4-17-12(f) requires that when appealing a decision of the Review Board of the Indiana Department of Employment and Training Services, “[t]he appellant shall attach to the transcript an assignment of errors.”⁶⁶

On three separate occasions in 1994, three different unemployment compensation claimants sought judicial review of the Review Board's decision pursuant to Appellate Rule 4(C).⁶⁷ In each of those cases, the appellant failed to comply with Appellate Rule 7.2(A)(1) and section 22-4-17-12(f) of the Indiana Code by not including an assignment of errors in the record of the proceedings.⁶⁸ In two of the cases, the court of appeals found this omission in the record of the proceedings to be a jurisdictional defect that warranted dismissal.⁶⁹ In a third decision, however, the appellate court found no jurisdictional defect and asserted its inherent authority to consider the merits of the appeal.⁷⁰ These three cases frame the debate.

In *Claywell v. Review Board of Indiana*, Claywell did not file an assignment of errors, and the Review Board argued that the court of appeals did not, therefore, have jurisdiction to consider the appeal.⁷¹ The court of appeals held that “[t]he timely filing with this court of an assignment of errors for appeals from the Review Board is a jurisdictional act.”⁷² The court of appeals observed that “the problem is that Claywell has failed to invoke the jurisdiction of this court to hear her appeal by failing to timely file an assignment of

64. *St. Amand-Zion v. Review Bd. of Ind.*, 635 N.E.2d 184 (Ind. Ct. App. 1994); *Claywell v. Review Bd. of Ind.*, 635 N.E.2d 181 (Ind. Ct. App. 1994); *Hogan v. Review Bd. of Ind.*, 635 N.E.2d 172 (Ind. Ct. App. 1994).

65. IND. APP. R. 7.2(A)(1).

66. IND. CODE § 22-4-17-12(f) (1993).

67. See cases cited *supra* note 64.

68. See cases cited in *supra* note 64.

69. *St. Amand-Zion*, 635 N.E.2d at 185-86; *Claywell*, 635 N.E.2d at 183-84.

70. *Hogan*, 635 N.E.2d at 178-79.

71. *Claywell*, 635 N.E.2d at 182.

72. *Id.* (citing *South Madison Community Sch. Corp. v. Review Bd. of Ind.*, 622 N.E.2d 1042, 1043 (Ind. Ct. App. 1993)).

errors. Therefore, we must dismiss this appeal.”⁷³ The court of appeals reached the same conclusions in *St. Amand-Zion v. Review Board of Indiana*.⁷⁴

In *Hogan v. Review Board of Indiana*,⁷⁵ however, although presented with the same operative facts, Presiding Judge Sullivan, writing for the Second District of the Court of Appeals of Indiana, arrived at the opposite result. The court held that “[t]he jurisdictional predicate relied upon by the other panels is a relic of the past. The requirement has been abolished.”⁷⁶

In large part, the Second District’s holding is founded upon a strained reading of *Lugar v. State*.⁷⁷ In *Lugar*, in response to appellant’s petition to transfer, appellees argued that the appeal should be dismissed due to various procedural defects.⁷⁸ First, appellees argued that the court of appeals abused its discretion when it granted appellants’ motion for an emergency extension of time to file their brief because that motion was not filed in compliance with Indiana Appellate Rule 14(A) (specifically, it was not accompanied by a separate sworn statement).⁷⁹ Appellees also argued that the appellants waived various arguments by failing to raise them in their motion to correct error.⁸⁰ Finally, appellees argued that appellants waived various errors by failing to comply with Indiana Appellate Rules 8.3(A)(5) and 8.3(A)(7).⁸¹ The Indiana Supreme Court held:

This Court has inherent discretionary power to entertain an appeal after the time allowed has expired. The Court of Appeals also has this power. However an appeal under such conditions is not a matter of right and will not be permitted in every situation. This Court will exercise such discretion “only in rare and exceptional cases, such as in matters of great public interest, or where extraordinary circumstances exist.”⁸²

The Supreme Court then found that because a matter of great public importance was at stake,⁸³ it was proper for the court of appeals to have heard the untimely appeal.⁸⁴

73. *Id.* at 183 (citing *South Madison*, 622 N.E.2d 1042).

74. *Id.* at 185-86.

75. 635 N.E.2d 172 (Ind. Ct. App. 1994).

76. *Id.* at 174.

77. 383 N.E.2d 287 (Ind. 1978).

78. *Id.* at 289.

79. *Id.*

80. *Id.* That *Lugar* was decided in 1978 when the filing of a motion to correct error was still a jurisdictional prerequisite for an appeal is noteworthy.

81. *Id.*

82. *Lugar v. State*, 383 N.E.2d 287, 289 (Ind. 1978) (citing *State ex rel. Cook v. Howard*, 64 N.E.2d 25 (Ind. 1945) and *Lowe v. Gardner*, 158 N.E.2d 808 (Ind. App. 1959) and quoting *Costanzi v. Ryan*, 368 N.E.2d 12, 16 (Ind. App. 1977)).

83. *Lugar* dealt with a mandate action relating to the inclusion of a clothing allowance in the computation of police pension fund benefits for former members of the Indianapolis Police Department, their widows, or next of kin.

84. *Lugar*, 383 N.E.2d at 289-90.

After citing *Lugar* for the proposition that “failure to file a timely Motion to Correct Errors did not deprive the appellate court of jurisdiction,”⁸⁵ the court of appeals in *Hogan* went on to hold:

We do not unilaterally decide that an assignment of errors is no longer required on appeal. That requirement has been put in place by the legislature, and it is not our prerogative to abolish it. However, we do hold that failure to include such assignment does not deprive us of jurisdiction, nor prevent us from exercising our inherent power to hear this cause. We recognize that *pro se* litigants are held to the same requirements as professional attorneys. We also recognize that “[j]udges have no right, upon mere whim, to disregard rules or principles of law.” However, given the compelling policy of deciding cases upon the merits rather than technicalities, we hold that this case should be reviewed and we proceed to do so.⁸⁶

Then, without finding that Hogan’s case was in any way “rare and exceptional,” an express requirement under *Lugar*, the Second District considered the merits of his case on appeal. Curiously, after all of the gymnastics associated with the Second District’s assertion of its inherent discretion to consider the merits of Hogan’s appeal, the court of appeals found no merit and upheld the Review Board’s findings.⁸⁷ The appellate panel in *St. Amand-Zion* criticized the *Hogan* court, and noted that “a case involving the denial of unemployment compensation is not the ‘rare and exceptional case’ which would warrant the exercise of inherent power to entertain an untimely appeal.”⁸⁸

B. The Implications of the Debate

For the appellate practitioner, the Indiana Rules of Appellate Procedure form an arsenal that serves as the first line of defense for appellate argument. The expectation that procedural arguments drawn from that quiver may—or normatively, *should*—be fatal to the opponent’s cause is bolstered by the frequent decisions from the appellate courts dismissing appeals due to various degrees of noncompliance with the procedural rules.⁸⁹ Decisions like *Hogan* cause practitioners to question the validity of this expectation, particularly since *Hogan* pays so little respect to the principle of *stare decisis* and the clear import of *Lugar*.

The narrow issue raised by *Claywell*, *St. Amand-Zion*, and *Hogan*—when and under what circumstances an assignment of errors is required—will eventually be resolved by the Indiana Supreme Court.⁹⁰ The broader issue—when practitioners should expect the

85. *Hogan v. Review Bd. of Ind.*, 635 N.E.2d 172, 176 (Ind. Ct. App. 1994).

86. *Id.* at 179 (quoting *Baker v. State*, 221 N.E.2d 432, 434 (Ind. 1966) (citations omitted)).

87. *Id.* at 180.

88. *St. Amand-Zion v. Review Bd. of Ind.*, 635 N.E.2d 184, 186 (Ind. Ct. App.); *see also Claywell v. Review Bd. of Ind.*, 635 N.E.2d 181, 183 (Ind. Ct. App. 1994), *aff’d*, 643 N.E.2d 330 (Ind. 1994) (explaining that “[t]he case before us today does not involve a matter of great public interest or extraordinary circumstances”).

89. *See supra* Part II.

90. The Indiana Supreme Court addressed the issue shortly before this Article went to print in *Claywell v. Review Bd. of Ind.*, 643 N.E.2d 330 (Ind. 1994). The court held that “[t]he Fifth District got it right”;

appellate courts to circumvent precedent in search of substantial justice—will likely not be answered soon. So long as the appellate judiciary exists, it will have an occasional interest in doing something more than mechanically applying the rules of appellate procedure. For the appellate practitioner, what is lost in the realm of predictability will hopefully be gained in the joy of reading well-crafted appellate decisions.

The most important lesson of *Hogan* for the appellate practitioner is to never depend, solely, on the strength of appellate arguments that are founded upon procedural defects. The best appellate argument is based on the merits of the case.

IV. INDIANA APPELLATE PROCEDURE IN 1995 AND BEYOND

Last year's Survey article predicted the development in 1994 of a standard of review under which the appellate courts would consider trial courts' application of the new Indiana Rules of Evidence.⁹¹ The year did not bear any fruit in that regard. However, now that the Indiana Rules of Evidence have been in effect for over one year,⁹² that such a standard will emerge in 1995 seems certain.

As happened in 1994, 1995 is bound to offer more old lessons. These lessons will serve as constant and helpful reminders to Indiana's appellate practitioners.

perfecting a timely appeal is a jurisdictional matter, and the court of appeals was correct to decline Claywell's untimely appeal. *Id.* at 330-31.

91. Patton, *supra* note 2, at 860.

92. The INDIANA RULES OF EVIDENCE became effective on January 1, 1994.

RECENT DEVELOPMENTS IN THE INDIANA LAW OF PRODUCT LIABILITY

TIMOTHY C. CARESS*

INTRODUCTION

This Article surveys the most significant developments in Indiana product liability law from November 1, 1993 through October 31, 1994. The opinions reviewed include both Indiana decisions and federal court decisions construing Indiana law. While the number of opinions addressing product liability issues was relatively small, several important decisions are worthy of Survey coverage.

I. FORESEEABLE USE AND INDUSTRY STANDARDS

In *Short v. Estwing Manufacturing Corp.*,¹ the Indiana Court of Appeals for the Fifth District addressed the meaning of the "reasonably expectable use" provision of the Indiana Product Liability Act.² The plaintiff, an eight-year old boy, was in the back yard of the family home watching his stepfather use a nail hammer to dig a trench in the ground around the house.³ The plaintiff decided to try the same task. While his stepfather was preoccupied, the plaintiff retrieved the hammer and began to scrape away rocks in the trench.⁴ Discovering a large rock embedded in the ground, he attempted to remove it by digging around the rock with the claw end of the hammer.⁵ When that proved unsuccessful, he struck the claw end of the hammer against the rock and, on impact, a metal chip broke from the claw end of the hammer and flew into his eye. As a result, he suffered a permanent loss of vision.⁶ The boy, by his parents, filed a strict products liability and negligence action against the hammer manufacturer for the child's injury.⁷ The trial court granted summary judgment in favor of the manufacturer.⁸

On appeal, the court examined the Indiana Product Liability Act, which provides in relevant part:

- (a) A product is in a defective condition under this chapter if, at the time it is conveyed by the seller to another party, it is in a condition:
 - (1) not contemplated by reasonable persons among those considered expected users or consumers of the product; and
 - (2) that will be unreasonably dangerous to the expected user or consumer when used in reasonably expectable ways of handling or consumption.

* Associate, Yosha, Ladendorf, Krahulik & Weddle, Indianapolis. B.A., 1991, Indiana University; J.D., *summa cum laude*, 1994, Indiana University School of Law—Indianapolis.

1. 634 N.E.2d 798 (Ind. Ct. App. 1994).
2. IND. CODE § 33-1-1.5-2.5 (1988).
3. *Short*, 634 N.E.2d at 800.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

....

(c) A product is not defective under this chapter if it is safe for reasonably expectable handling and consumption. If an injury results from the handling, preparation for use, or consumption that is not reasonably expectable, the seller is not liable under this chapter.⁹

The manufacturer claimed that striking a rock with the claw end of an ordinary nail hammer is not a reasonably expectable use and thus the product was not in a defective condition as a matter of law.¹⁰ The court rejected the manufacturer's contention and determined that reasonably expectable use, like reasonable care, involves questions concerning the ordinary prudent person, or in the case of products liability, the ordinary prudent consumer.¹¹ The court also found that "[t]he manner of use required to establish 'reasonably expectable use' under the circumstances of each case is a matter peculiarly within the province of the jury."¹² The court further provided:

The test of "reasonably expectable use" centers on the manner of use which an ordinary prudent consumer would employ under the same or similar circumstances. In applying the test, it is not what the fact finder would have done as an individual, or in the case of a jury, even collectively. Rather, it is a matter of what the fact finder determines the abstract, reasonably prudent consumer would have done under the circumstances.¹³

The court made clear that questions of reasonableness cannot generally be resolved by motions for summary judgment and that the principle was especially true in this case "because an ordinary claw nail hammer is generally used in a variety of ways other than 'pulling common unhardened nails and ripping apart or tearing down wooden components or structures.'"¹⁴ In its discussion regarding the characteristics of a hammer, the court cited *Dunham v. Vaughan & Bushnell Manufacturing Co.*,¹⁵ which provided:

[A] hammer is an implement of beguiling simplicity, and there is probably no artifact with so many uses, real or fancied. No one is in awe of the art of using a hammer, and everyone, or anyone, deems himself competent to employ it, albeit, artfully or in frustration. It is to be found in many households, and children, from the time they are able to lift the artifact, can use it with enthusiasm, although the benefits may be dubious. A hammer is a hammer to most people and limitations in the implement, or its age, fitness and condition, are not apparent to the unsophisticated.¹⁶

9. IND. CODE § 33-1-1.5-2.5 (1988).

10. *Short*, 634 N.E.2d at 801.

11. *Id.*

12. *Id.* (citing *Lovely v. Keele*, 333 N.E.2d 866 (Ind. App. 1975)).

13. *Id.* See also *Peavler v. Board of Comm'rs*, 557 N.E.2d 1077 (Ind. Ct. App. 1990) (applying test in the case of reasonable care).

14. *Short*, 634 N.E.2d at 801.

15. 229 N.E.2d 684 (Ill. App. Ct. 1967), *aff'd*, 247 N.E.2d 401 (Ill. 1969).

16. *Id.* at 691.

The court concluded that “[b]ecause an issue of fact existed regarding whether Short’s use of the hammer was reasonably foreseeable and thus whether the hammer was defective under [Indiana Code section] 33-1-1.5-2.5, summary judgment in favor of the manufacturer was improper and must be reversed.”¹⁷

The *Short* court also addressed the manufacturer’s argument responding to the negligence claim; specifically, its contention that there had been no breach of duty *as a matter of law* because the hammer complied with ANSI standards.¹⁸ In rejecting this argument, the court recognized that “[s]tandards set by an industry do not define the standard of reasonable care against which the conduct of a manufacturer in that industry will be measured in a negligence case.”¹⁹ The court further provided that “[t]he fact that a particular product meets or exceeds the requirements of its industry is not conclusive proof that the product is reasonably safe. In fact, standards set by an entire industry can be found negligently low if they fail to meet the test of reasonableness.”²⁰ As such, the court found that whether the manufacturer breached its duty of care was a question best left for the fact finder and thus found summary judgment improper.²¹

II. SUBSTANTIAL ALTERATION; OPEN AND OBVIOUS DANGER RULE; INCURRED RISK; PRODUCT WARNINGS

In *Schooley v. Ingersoll Rand, Inc.*,²² the Indiana Court of Appeals for the Fourth District addressed several important issues pertaining to Indiana products liability law. In *Schooley*, the plaintiff was injured during the course of her employment with Arrow Tool Company.

She was directed by her supervisor to clean and move a 1500 pound steel plate hanging on a hoist hook. She observed that the plate was not restrained by the chains typically attached to both the hook and the plate, but was hanging on the hook. Realizing the danger of moving the plate, but with the belief that the job could be safely accomplished, [the plaintiff] began to operate the hoist upon which the hook was attached. The plate came loose from the hook and fell on her. [Her] right foot was sheared at the ankle.²³

The plaintiff brought a strict product liability and negligence suit against the manufacturer of the hoist hook, as well as others.²⁴ The plaintiff alleged that the accident would not have happened if the safety latch had been in place on the hoist hook that she used.²⁵ The plaintiff also asserted that the defendant manufactured hoist hooks equipped with safety latches that were easily broken and that the defendant knew the safety latches

17. 634 N.E.2d 799, 801 (Ind. Ct. App. 1994).

18. *Id.* at 802.

19. *Id.* (citing *Thiele v. Faygo Beverage, Inc.*, 489 N.E.2d 562, 575 (Ind. Ct. App. 1986)).

20. *Id.* (quoting *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266, 276 (Ind. App. 1972)).

21. *Id.*

22. 631 N.E.2d 932 (Ind. Ct. App. 1994).

23. *Id.* at 935.

24. *Id.* at 936.

25. *Id.* at 937.

would be broken and not repaired.²⁶ The defendant maintained that the plaintiff's employer's failure to replace the hoist hook's safety latch operated as a superseding cause of the plaintiff's injuries.²⁷ The trial court granted summary judgment in favor of the defendants.²⁸

On the substantial alteration issue, the plaintiff contended that the trial court erred in concluding that the hoist hook was substantially altered after its sale to her employer, and argued that a product is not "substantially" altered if the manufacturer of the product could have foreseen the alteration.²⁹ The court of appeals initially noted that the defense pertinent to the issue of substantial alteration is found in Indiana Code section 33-1-1.5-4(b)(3), which provides:

[I]t is a defense that a cause of the physical harm is a modification or alteration of the product made by any person after its delivery to the initial user or consumer if such modification or alteration is the proximate cause of physical harm where such modification or alteration is not reasonably expectable to the seller.³⁰

The court defined substantial change as "any change which increases the likelihood of a malfunction, which is the proximate cause of the harm complained of, and which is independent of the expected and intended use to which the product is put."³¹ The court further noted that in a strict liability case, liability can be imposed on the manufacturer or seller "even though [a] product is altered or changed if it is foreseeable that the alteration would be made and the change does not unreasonably render the product unsafe."³² The court also noted that "[t]he question involved 'is whether the alteration of the product was a superseding cause'"³³ and recognized that the issue of foreseeability is normally a question of fact appropriate for determination by the jury.³⁴

In its consideration of the specific facts of *Schooley*, the court found that the breakage of the safety latch and failure to replace the same could be found foreseeable because the manufacturer knew of the weaknesses in its safety latches and the infrequency of replacement by the companies using its hoist hooks.³⁵ As such, the court found it proper for the fact finder to decide whether a foreseeable alteration had occurred and whether Indiana Code section 33-1-1.5-4(b)(3) would operate as a viable defense to the plaintiff's strict liability claim.³⁶

26. *Id.*

27. *Id.*

28. *Id.* at 936.

29. *Id.* at 937.

30. *Id.* at 938.

31. *Id.* (quoting *Montgomery Ward & Co. v. Gregg*, 554 N.E.2d 1145, 1157 (Ind. Ct. App. 1990) (quoting *Cornette v. Searjeant Metal Prods., Inc.*, 258 N.E.2d 652, 653 (Ind. App. 1970))).

32. *Id.* (quoting *Craven v. Niagara Machine and Tool Works, Inc.*, 425 N.E.2d 654, 655 (Ind. Ct. App. 1981)).

33. *Id.*

34. *Id.* (citing *Montgomery Ward*, 554 N.E.2d at 1156).

35. *Id.*

36. *Id.*

The plaintiff contended that the trial court erred in granting summary judgment on the basis that the product negligence claim was barred by the open and obvious rule.³⁷ The plaintiff claimed “that the open and obvious rule [did] not apply to product negligence cases.”³⁸ In addressing the plaintiff’s contention, the court noted that the open and obvious danger rule originated in *Bemis Co. v. Rubush*,³⁹ which provides:

[T]he defect must be hidden and not normally observable, constituting a latent danger in the use of the product. Although the manufacturer who has actual or constructive knowledge of an unobservable defect or danger is subject to liability for failure to warn of the danger, he has no duty to warn if the danger is open and obvious to all.⁴⁰

The court further noted that the Indiana Supreme Court expressly abrogated the open and obvious danger rule in strict product liability actions.⁴¹ However, the court relied upon the Indiana Supreme Court’s decision in *Miller v. Todd*⁴² to determine that the open and obvious danger rule remains a defendant’s dagger in product negligence cases.⁴³ While recognizing the existence of evidence indicating that the danger of using the hoist hook without a safety latch was open and obvious, the court determined that the question of whether the plaintiff should have recognized the danger of the plate falling upon being

37. *Id.*

38. *Id.*

39. 427 N.E.2d 1058 (Ind. 1981), *cert. denied*, 459 U.S. 825 (1982).

40. *Schooley*, 631 N.E.2d at 938 (quoting *Bemis Co.*, 427 N.E.2d at 1061).

41. *Id.* (citing *Koske v. Townsend Eng’g Co.*, 551 N.E.2d 437, 442 (Ind. 1990)).

42. 551 N.E.2d 1139 (Ind. 1990).

43. *Schooley*, 631 N.E.2d at 939. Unfortunately, the open and obvious danger rule continues to operate in product negligence cases despite the wholly unjust and illogical results it produces. In essence, the retention of the open and obvious danger rule tacitly encourages manufacturers to incorporate patently dangerous features into product design and thereby obliterate product negligence liability because the danger, however easy to remedy, will be obvious to the consumer. To examine the “consumer expectation” approach mandated by the text of the Indiana Product Liability Act is even more disturbing. See IND. CODE §§ 33-1-1.5-2, -2.5 (1993). While it is true that the Indiana Supreme Court expressly abrogated the open and obvious danger rule in strict product liability actions, the reasoning that underlies the open and obvious danger rule continues to operate, under the guise of “consumer expectation,” to bar plaintiffs’ recoveries. For example, if the trier of fact determines that the dangers posed by a product are within the contemplation of an ordinary consumer, this determination is tantamount to declaring that the danger was sufficiently apparent so as to be open and obvious. Conversely, if a product’s danger or defect is open and obvious, then the defect must also be within the contemplation of the ordinary consumer. If the danger or defect is within the contemplation of the ordinary user, then even patent dangers do not frustrate the consumer’s expectations of safety. In such a case, the “consumer expectation” is too low to be a valid gauge of the defectiveness of the product. This very situation is addressed by the reasoning of the open and obvious danger rule, which is not available in a strict product liability action. However, strict adherence to the “consumer expectation” test re-enacts this otherwise unavailable defense. For a thorough discussion regarding the inadequacies of the open and obvious danger rule and the “consumer expectation” approach, see John Vargo, *Strict Liability for Products: An Achievable Goal*, 24 IND. L. REV. 1197 (1991); Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183 (1992).

moved was a question for the jury to decide. The jury must decide this issue by weighing the evidence provided by the defendant's expert against the evidence that the presence of safety latches was not common in the plant.⁴⁴ As such, the court could not decide, as a matter of law, that the absence of the safety latch was an open and obvious danger.⁴⁵

The *Schooley* court noted that incurred risk is a defense to both strict product liability and negligence claims.⁴⁶ The court reiterated the principle that the incurred risk defense "involves a mental state of venturousness on the part of the actor, and *demands a subjective analysis* into the actual knowledge and voluntary acceptance of the risk."⁴⁷ Therefore, the court properly concluded that the incurred risk defense can rarely be determined as a matter of law and is almost always properly left for resolution by the trier of fact.⁴⁸

In *Schooley*, the court was confronted with the incurred risk defense in the context of the plaintiff's workplace. In such an environment, the court reasoned that the issue of whether an employee has incurred the risk of an activity incidental to his or her employment is generally a question of fact for the jury to decide.⁴⁹ The *Schooley* court found that the evidence demonstrated that the plaintiff did not contemplate that the steel plate would slip from the hoist hook, turn when it hit the skid, and fall to the side where she was standing; therefore, the court found that she was not aware of the specific risk of using a product that was lacking a safety device.⁵⁰ Accordingly, the court properly determined that the question of whether the plaintiff voluntarily incurred the risk of her injuries was a question of fact for the jury, as the court could not decide that she incurred the risk as a matter of law.⁵¹

Finally, the *Schooley* court addressed the issue of whether the hoist hook was defective because of the manufacturer's failure to warn about the dangers of using it without a safety latch. The court turned to Indiana Code section 33-1-1.5-2.5(b)(1), which provides a duty to:

- (1) properly package or label the product to give reasonable warnings of danger about the product; or
-

44. *Schooley*, 631 N.E.2d at 939.

45. *Id.*

46. *Id.*

47. *Id.* at 940 (emphasis added) (quoting *Beckett v. Clinton Prairie Sch. Corp.*, 504 N.E.2d 552, 554 (Ind. 1987) (quoting *Power v. Brodie*, 460 N.E.2d 1241, 1243 (Ind. Ct. App. 1984))).

48. *Id.*

49. *Id.* See also *Richardson v. Marrell's, Inc.*, 539 N.E.2d 485 (Ind. Ct. App. 1989) (fact question as to whether employee who slipped on ice while making delivery incurred risk of slipping); *Kroger Co. v. Haun*, 379 N.E.2d 1004 (Ind. App. 1978) (fact question as to whether employee incurred risk of injury by operating defective forklift in congested area); *Meadowlark Farms, Inc. v. Warken*, 376 N.E.2d 122 (Ind. App. 1978) (issue of whether plaintiff assumed risk as an incident of sharecropping agreement was for jury). Indiana law "has also recognized that prior knowledge of specific dangers of a job and acceptance of these dangers warrants a finding of incurred risk as a matter of law." *Schooley*, 631 N.E.2d at 940; see *Ferguson v. Modern Farm Sys., Inc.*, 555 N.E.2d 1379, 1381-82 (Ind. Ct. App. 1990).

50. *Schooley*, 631 N.E.2d at 939.

51. *Id.*

(2) give reasonably complete instructions on proper use of the product; when the seller, by exercising reasonable diligence, could have made such warnings or instructions available to the user or consumer.⁵²

The court further noted that “[a] product may be defective if there is a failure to warn or instruct of potential and unknown dangers in the product’s use, even if the product’s design, materials, and workmanship are virtually faultless.”⁵³ The court also recognized that “[t]he duty to warn is normally non-delegable.”⁵⁴ In *Schooley*, the court found no evidence that the manufacturer warned the plaintiff or her employer regarding the dangers of using the hoist hook when the safety latch was not intact.⁵⁵ Predictably, the manufacturer attempted to circumvent liability arising from its failure to warn by contending that it was relieved of such duty by virtue of the obviousness of the danger; however, the court properly rejected this misguided argument by noting that the issue of the plaintiff’s knowledge regarding the limitations of the hoist hook was an issue to be resolved by the jury.⁵⁶

III. STATUTE OF REPOSE AND NEGLIGENT RECALL

In *Avery v. Mapco Gas Products, Inc.*,⁵⁷ the United States Court of Appeals for the Seventh Circuit addressed the statute of repose provision contained within the Indiana Product Liability Act.⁵⁸ The court also addressed whether Indiana recognizes an independent claim for negligent recall that would survive the limitations imposed by the statute of repose. The Seventh Circuit found that the ten-year statute of repose barred the plaintiffs’ products liability claim.⁵⁹ Further, the court determined that the plaintiffs’ negligent recall claim merged with the underlying products liability claims and thus was also barred.⁶⁰

On the morning of May 18, 1988, the plaintiffs in *Avery* awoke to the smell of gas in their home. They proceeded into their home’s basement to investigate the persistent gas odor and to check the furnace pilot light. When the plaintiffs turned on a flashlight to inspect the furnace, the furnace exploded. A valve manufactured by the defendant to regulate the flow of gas into the furnace had been recalled in 1980 after the defendant concluded that the valve might fail to perform a critical safety function. Specifically, when the pilot flame on a furnace was extinguished, the valve might still permit gas to flow into the furnace burner when the thermostat called for heat. Propane gas, which fueled the plaintiffs’ furnace, might pool around the furnace and create the potential for an explosion. The plaintiffs claimed that precisely this result occurred.⁶¹

52. *Id.*

53. *Id.* (quoting *Jarrell v. Monsanto Co.*, 528 N.E.2d 1158 (Ind. Ct. App. 1988)).

54. *Id.*

55. *Id.* at 941.

56. *Id.*

57. 18 F.3d 448 (7th Cir. 1994).

58. See IND. CODE § 33-1-1.5-5(b) (1988).

59. *Avery*, 18 F.3d at 453.

60. *Id.* at 454.

61. *Id.* at 450.

The evidence disclosed that the defendant had conducted the valve recall with the approval and oversight of the Consumer Product Safety Commission and in cooperation with propane gas suppliers.⁶² Suppliers were asked to either supply the defendant manufacturer with a list of their customers, so that the defendant could contact them directly, or, in the alternative, to contact their customers on the manufacturer's behalf. In April 1983, the supplier of propane to the plaintiffs' home notified the defendant manufacturer that it had mailed recall notices to its customers with their monthly statements. Theoretically, the plaintiffs' predecessors should have received such a notice. However, the prior owners of the home could not recall receiving a notice, and the appropriate repairs were never made pursuant to the recall.

To decide the statute of repose issue, the court turned to section five of the Indiana Product Liability Act, which provides:

[A]ny product liability action in which the theory of liability is negligence or strict liability in tort must be commenced within two (2) years after the cause of action accrues or within ten (10) years after the delivery of the product to the initial user or consumer; except that, if the cause of action accrues more than eight (8) years but not more than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.⁶³

Therefore, the critical inquiry focused on when the defendant's valve in question was delivered to the initial user or consumer.⁶⁴ The evidence indicated that the plaintiffs' furnace was manufactured in 1969 and installed in the plaintiffs' home no later than 1975. Because the installation occurred thirteen years before the explosion and thus the claim would be barred by the statute of repose, it was incumbent upon the plaintiffs to demonstrate that the valve was replaced within ten years of the explosion.

The Seventh Circuit found the plaintiffs' evidence to be insufficient, as a matter of law, to establish that the valve in question was installed within ten years prior to the explosion. While the plaintiffs presented some evidence supporting the possibility that the valve might have been installed within ten years of the explosion, the court found that such evidence would do little more than allow a reasonable fact-finder to speculate that the valve in question was not the original and that it may have been replaced at some point within the ten-year statute of repose time period.⁶⁵ The court clarified that the defendant, as the party seeking summary judgment, bore the initial burden of identifying evidence tending to show that its valve was installed in the plaintiffs' furnace more than ten years

62. *Id.*

63. *Id.* at 451 (citing IND. CODE § 33-1-1.5-5(b) (1993)).

64. The defendant manufacturer of the valve contended that the manufacturer of the furnace should be considered the initial user of the valve. Under that view, the period of repose would have begun to run in 1969, when the plaintiffs' furnace was assembled. The district court rejected this argument, concluding that for purposes of its consumer protection law, Indiana does not deem the manufacturer of a product to be the initial user of its component parts. Accordingly, the district court held the owner of the plaintiffs' home at the time it was installed to be the initial user or consumer. *Id.* at 451-52, n.2.

65. *Id.* at 453.

before the explosion.⁶⁶ However, once the defendant met this burden, the plaintiffs would bear the burden at trial of establishing avoidance of the statute of repose.⁶⁷ The court determined that the defendant had produced ample evidence indicating that the valve was not installed after 1975, and acknowledged that although it was possible that the valve had subsequently been replaced, the defendant "was not required to negate each and every possibility that might enable the [plaintiffs] to avoid the statute of repose."⁶⁸

The plaintiffs further contended that the defendant failed to conduct a more effective recall campaign, arguing that such a claim "is independent of the products liability claims because it is based on a voluntary undertaking that significantly post-dates the manufacture of the product."⁶⁹ However, the Seventh Circuit rejected this contention and determined that the negligent recall claim merged with the underlying products liability claim and was thus also barred by the statute of repose.⁷⁰

The Seventh Circuit relied upon *Dague v. Piper Aircraft Corp.*⁷¹ in rejecting the plaintiffs' attempt "to carve out an exception to the statute of repose for claims based on the defendant's failure to warn."⁷² In *Dague*, the Indiana Supreme Court provided:

[A]n action for damages resulting from the alleged failure of a manufacturer or seller to warn a user of its product's latently defective nature is certainly a product liability action based on a theory of negligence and, ultimately, is one in which the claim is made that the damage was caused by or *resulted from* the manufacture, construction or design of the product. The Product Liability Act expressly applies to all product liability actions sounding in tort, including those based upon the theory of negligence, and the legislature clearly intended that *no* cause of action would exist on any such product liability theory after ten years. It is not our office to question the wisdom of the legislature's enactments.⁷³

However, the plaintiffs' recall claim was not based on *Dague*'s general duty to warn, but was instead based on the defendant's independent duty, once they initiated their valve recall, to conduct that effort in a reasonable fashion. The plaintiffs analogized their claim "to one against a 'good samaritan' who, although not bound to act in the first instance, is subject to a duty of reasonable care once she voluntarily undertakes to aid another and is thus liable for her negligence."⁷⁴ Nonetheless, the Seventh Circuit perceived the "negligent recall" claim to be nothing more than a re-named "failure to warn" claim.⁷⁵ Insofar as the negligent recall claim was based on the defendant's failure to "get the word out," the Seventh Circuit found it barred by the Indiana Supreme Court's opinion in

66. *Id.* at 452.

67. *Id.* (citing *Nichols v. Amax Coal Co.*, 490 N.E.2d 754, 755 (Ind. 1986)).

68. *Id.* at 453 (citing *Schamel v. Textron-Lycoming*, 1 F.3d 655, 657-58 (7th Cir. 1993)).

69. *Id.* at 454.

70. *Id.*

71. 418 N.E.2d 207 (Ind. 1981).

72. *Avery*, 18 F.3d at 454.

73. *Dague*, 418 N.E.2d at 212 (citations omitted).

74. *Avery*, 18 F.3d at 454.

75. *Id.*

*Dague.*⁷⁶ While the court recognized that the plaintiffs' recall claim did contain allegations other than a mere failure to warn, it determined that no evidence indicated that any flaws in the recall campaign, beyond the failure to warn, were the proximate cause of the plaintiffs' injury since neither the plaintiffs nor their predecessors ever received any recall information at all.⁷⁷

IV. "SELLER" REQUIREMENT

In *Green v. Whiteco Industries, Inc.*,⁷⁸ the Seventh Circuit addressed the meaning and scope of the "seller" requirement for purposes of the Indiana Product Liability Act. The plaintiff, a drummer, was performing with the Neville Brothers band in a theater owned and operated by the defendant. The performance contract between the band and the defendant stated that the defendant would provide a "professional quality sound system . . . and engineer/operator."⁷⁹ The plaintiff alleged that during the concert he signalled to the stagehand that he needed to hear more saxophone from his speaker, which was three feet from his head. After this message was relayed to the operator of the sound system, the volume of the speaker shot upward causing a sound blast that left the plaintiff with permanent ear damage and hearing loss. The plaintiff pursued an action against the defendant alleging that the sound system was in a defective condition unreasonably dangerous and thus the defendant should be liable for strict products liability.⁸⁰

The Seventh Circuit initially noted that Indiana law imposes strict liability on any person who "sells, leases, or otherwise puts into the stream of commerce any product in a defective condition unreasonably dangerous . . . if . . . [t]he seller is engaged in the business of selling such a product."⁸¹ The statute defines "seller" as "a person engaged in business as a manufacturer, a wholesaler, a retailer, a lessor, or a distributor."⁸²

The plaintiff contended that the defendant was a "lessor" within the meaning of the statute and therefore subject to liability under the Product Liability Act. In support thereof, the plaintiff introduced evidence that the defendant regularly leased sound systems in the course of its business.⁸³ The Seventh Circuit, however, drew exactly the opposite inference than the plaintiff had intended. The court found that the evidence demonstrated that the defendant was in fact a lessee, not a lessor, of the sound system, and that the Product Liability Act does not subject lessees to strict liability for defective products.⁸⁴

The Seventh Circuit further determined that, with regard to the lessor-lessee issue, the defendant was not "*engaged in business as a manufacturer, a wholesaler, a retailer, a lessor or a distributor*"; therefore, on this additional basis, the defendant was not subject

76. *Id.* at 455.

77. *Id.*

78. 17 F.3d 199 (7th Cir. 1994).

79. *Id.* at 200.

80. *Id.* at 201-02.

81. *Id.* at 203 (citing IND. CODE § 33-1-1.5-3 (West Supp. 1993)).

82. IND. CODE § 33-1-1.5-2 (1988).

83. *Green*, 17 F.3d at 203.

84. *Id.*

to strict liability under the Product Liability Act.⁸⁵ However, in declaring that the defendant was not “engaged in business,” the court did little more than provide a simple conclusory statement. The court wholly failed to explain or define the meaning of “engaged in business” or to provide any guidance regarding the parameters of its application.

In *St. Mary Medical Center, Inc. v. Casko*,⁸⁶ the Indiana Court of Appeals for the Third District addressed the “seller of a product” requirement of the Product Liability Act in the context of medical services and products provided by healthcare professionals. The decedent, Samuel Casko, had received a pacemaker while a patient at St. Mary’s Medical Center. As a result of an alleged failure in the pacemaker, he died. The decedent’s estate filed suit alleging a products liability claim against, among others, St. Mary, which allegedly distributed and sold the product.

The court noted:

The Indiana Products Liability Act provides that a seller who places any defective product unreasonably dangerous to any consumer into the stream of commerce is subject to liability if the consumer is in the class of persons that the seller should reasonably foresee as being subject to such harm, *the seller is engaged in the business of selling such a product*, and the product is expected to and does reach the consumer without substantial alteration of the condition in which it was sold.⁸⁷

The Product Liability Act further provides that the term “‘product’ means any item or good that is personality at the time that it is conveyed by the seller to another party. *It does not apply to a transaction that, by its nature, involves wholly or predominantly the sale of a service rather than a product.*”⁸⁸

The plaintiff argued that the medical services provided by a hospital, consisting primarily of the nursing staff, should be treated under the Medical Malpractice Act, while the products sold by the hospital should properly be addressed by the Product Liability Act.⁸⁹ The defendant countered “that it [was] not a seller which [was] engaged in the business of selling pacemakers, but that it [was] in the business of providing professional medical services to its patients, including facilities, skilled personnel, and equipment.”⁹⁰ The defendant maintained “that the sale of various items necessary for a patient’s treatment are merely incidental to the overall purpose of providing healthcare.”⁹¹

In determining this important issue, the court of appeals relied upon *Dove by Dove v. Ruff*⁹² for guidance and concluded that the defendant was not liable under the Product

85. *Id.*

86. 639 N.E.2d 312 (Ind. Ct. App. 1994).

87. *Id.* at 313 (citing IND. CODE § 33-1-1.5-3(a) (West Supp. 1993)).

88. *Id.* (quoting IND. CODE § 33-1-1.5-2 (1988) (alteration in original)). For a discussion regarding the predominant thrust approach, as compared to the bifurcation approach, see Judy L. Woods and Brad A. Galbraith, *Recent Developments in Contract and Commercial Law*, 27 IND. L. REV. 769, 771-72 (1994).

89. *Casko*, 639 N.E.2d at 313-14.

90. *Id.* at 313.

91. *Id.*

92. 558 N.E.2d 836 (Ind. Ct. App. 1990).

Liability Act for the defective pacemaker.⁹³ In *Dove*, "the parents of a child who suffered a reaction to a drug brought a products liability suit against the physician who prepared and sold the medication."⁹⁴ The *Dove* court discussed the issue of whether the sale of the medication came within the definition of a product within the Product Liability Act:

By its nature, the practice of medicine is primarily a service, but there are times when goods are provided to patients incidental to the delivery of healthcare services. . . . The incidental furnishing of supplies or equipment during the course of medical treatment does not create a buyer-seller relationship between a patient and his physician which could give rise to an implied or express warranty. *In order for there to be liability under a theory of strict liability, the seller of the product must be engaged in the business of selling that item.*⁹⁵

In *Casko*, the court adopted the rationale set forth in *Dove* and found that the defendant's primary function was to provide medical services. The court reasoned that "unlike the products sold in a hospital gift shop, for which the hospital is strictly liable, the pacemaker provided to the patient is necessary to the patient's medical treatment . . . [and that] the hospital's actions concerning the provision of the pacemaker are 'integrally related to its primary function of providing medical services.'"⁹⁶ Therefore, although the plaintiff urged that the defendant was primarily a seller of goods and not a provider of medical services, the court disagreed and found that the defendant was a provider of medical services.⁹⁷ As such, the court found that the defendant could not be subject to strict liability for a defective product provided to a patient during the course of his or her treatment.⁹⁸

V. ALTERNATE DESIGN AND COST EFFICIENCY

In two cases, *Pries v. Honda Motor Co.*⁹⁹ and *Bammerlin v. Navistar International Transportation Corp.*,¹⁰⁰ the Seventh Circuit addressed the issue of alternative designs as it relates to product defects under Indiana law. In *Pries*, the plaintiff lost control of her automobile, which rolled over. "She was thrown clear of the car, broke her neck, and became a quadriplegic."¹⁰¹ The plaintiff "sued the car's manufacturer and distributor . . . contending that the car was defective because the seat belt mechanism permitted the belt to become slack when the car rolled over."¹⁰² In its discussion regarding whether the seat belt was defective, the court made clear that the plaintiff must compare the costs and

93. *Casko*, 639 N.E.2d at 315.

94. *Id.* at 314.

95. *Id.* (quoting *Dove* by *Dove v. Ruff*, 558 N.E.2d 836, 838 (Ind. Ct. App. 1990) (alteration in original)).

96. *Id.* (quoting *Hector v. Cedars-Sinai Medical Ctr.*, 225 Cal. Rptr. 595, 601 (Cal. Ct. App. 1986)).

97. *Id.* at 315.

98. *Id.*

99. 31 F.3d 543 (7th Cir. 1994).

100. 30 F.3d 898 (7th Cir. 1994).

101. *Pries*, 31 F.3d at 544-45.

102. *Id.* at 544.

benefits of alternative designs to demonstrate a defect.¹⁰³ The court found that Indiana law “requires the plaintiff to show that another design not only could have prevented the injury but also was cost-effective under general negligence principles.”¹⁰⁴

In *Bammerlin*, the Seventh Circuit further examined alternative design evidence as it relates to the establishment of a product defect. The plaintiff, “driving a loaded tractor-trailer weighing 20 tons . . . struck the right rear corner of another rig at approximately 25 miles per hour. The left half of the [plaintiff’s] cab decelerated rapidly, pushed by the weight of the trailer, the right half of the tractor . . . pivoted away.”¹⁰⁵ As a result, the cab disintegrated and the plaintiff wound up on the ground with serious injuries. The plaintiff brought an action against the truck manufacturer, alleging that the manufacturer had improperly designed the seatbelt assembly.¹⁰⁶ The Seventh Circuit acknowledged that the mere proof that a product failed in a particular accident does not necessarily establish that the product was defective;¹⁰⁷ instead, the establishment of a product defect turns on general principles of negligence.¹⁰⁸

In its discussion of whether the seat belt assembly in question was defectively designed, the court resorted to a straightforward cost-benefit analysis. In relevant part, the court provided:

Suppose the probability of the latch opening in a crash is 0.0001 if both [seat belt] anchors hold and 0.0002 if one anchor fails. Neither probability can be reduced by a redesign of the latch, which therefore cannot be called “defective.” Suppose further that the loss if the latch opens in an accident is \$500,000. Then the expected costs per vehicle attributable to belt opening are \$50 if both anchors hold and \$100 if only one anchor holds. If it costs, say, an extra \$10 to ensure that an anchor holds (as by securing it to the cab’s floor rather than its engine tunnel), then a prudent designer will incur the cost—and the vehicle is defective if an anchor fails. This is nothing but an application of Learned Hand’s formula for negligence, $B < PL$ (where B is the burden of precautions, L the loss if there is an accident that the precautions could have prevented, and P the probability of an accident if the precautions are not taken).¹⁰⁹

The court concluded its cost-benefit discussion by noting that the fact that “the probability of a particular failure is low is no defense if the costs of protecting against it are even lower.”¹¹⁰

103. *Id.* at 545.

104. *Id.* at 546.

105. *Bammerlin v. Navistar Int’l Transp. Corp.*, 30 F.3d 898, 899 (7th Cir. 1994).

106. *Id.* at 900.

107. *Id.* at 901.

108. *Id.* at 902 (citing *Miller v. Todd*, 551 N.E.2d 1139, 1141 (Ind. 1990)).

109. *Id.* (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)).

110. *Id.* (citing RESTATEMENT OF TORTS: PRODUCTS LIABILITY § 2(b) and Reporters’ Notes at 40-45, 123-25 (Tent. Draft No. 1, 1994)).

VI. ASBESTOS CAUSATION

In *Peerman v. Georgia-Pacific Corp.*,¹¹¹ the Seventh Circuit addressed the issue of whether the defendants' asbestos-containing products caused the plaintiff's decedent to develop mesothelioma. The decedent was employed at a manufacturing plant in Mt. Vernon, Indiana from 1963 to 1982.

The plant, a facility for the manufacture of parts and sub-assemblies for large utility boilers, consisted of several buildings and covered about 99 acres. During the majority of his employment . . . [the decedent] worked in the shipping and receiving department, where he was responsible for loading and unloading products shipped to and from the plant as well as transporting products within the plant. [The decedent] also worked as a supervisor in the shipping and receiving department, in which capacity he traveled throughout the plant as needed. During his tenure at the manufacturing plant, [the decedent] might have been exposed to asbestos dust.

....

In December of 1985, three years after he left the plant, the decedent died of malignant mesothelioma. [The plaintiff] allege[d] in her suit, that in the course of his duties at the [manufacturing] plant, the decedent was exposed to asbestos dust from the defendants' asbestos-containing products and that this caused him to develop mesothelioma.¹¹²

During the 1960s and 1970s, one of the defendants manufactured and sold a joint compound that contained asbestos.

Sometime between 1972 and 1979, construction workers applied such compound to the walls of [one of the buildings in] the plant. [Further,] [d]uring a one week period sometime between 1970 and 1975, following a fire at the [manufacturing] plant, construction workers sprayed [the other defendant's asbestos-containing product] on the north wall of an area of the plant known as "Five Bay." The district court granted summary judgment on the ground that [the plaintiff] had failed to produce evidence to support a reasonable inference that the defendants' products caused [the decedent] to contract mesothelioma.¹¹³

The Seventh Circuit initially noted that Indiana law governed the issue regarding whether the defendants' asbestos-containing products caused the decedent to develop mesothelioma.¹¹⁴ However, the court recognized that "[n]either the Supreme Court of Indiana nor the Indiana Court of Appeals ha[d] enumerated a test for causation in asbestos cases."¹¹⁵ Therefore, the court was confronted with selecting one of two competing approaches to be used in determining causation in asbestos cases. Specifically, the plaintiff maintained that the Indiana Supreme Court would adopt the "job site" test,

111. 35 F.3d 284 (7th Cir. 1994).

112. *Id.* at 285.

113. *Id.* at 286.

114. *Id.*

115. *Id.*

"which only requires proof that the asbestos-containing product was used at a job site at a time when the plaintiff was employed at that job site."¹¹⁶ Conversely, the defendants contended that the Indiana Supreme Court would adopt the test that requires proof of exposure to the asbestos-containing product.¹¹⁷

The Seventh Circuit, however, found it unnecessary to determine which approach would be adopted by the Indiana Supreme Court; instead, the court found that the plaintiff's claim failed under either approach.¹¹⁸ The court determined that "[a]lthough under the 'job site' test or any similar test for causation, a plaintiff need not produce evidence of actual exposure to the product that is alleged to have caused an asbestos-related disease, a plaintiff still must produce evidence sufficient to support an inference that he inhaled asbestos dust from the defendant's product."¹¹⁹ The court further provided that this inference can only be made if the plaintiff shows that the defendant's product, as it was used during the plaintiff's tenure at the job site, could possibly have produced a significant amount of asbestos dust and that the asbestos dust might have been inhaled by the plaintiff.¹²⁰ While the *Peerman* court recognized that the plaintiff did produce evidence that the decedent may have been exposed to some level of asbestos dust, the court determined that the plaintiff failed "to produce the necessary evidence that application of the products by the construction workers generated significant levels of asbestos dust, and [failed to demonstrate] that at least some of this dust could have drifted far enough in the plant to have been inhaled by [the decedent]."¹²¹ Therefore, the court held that no reasonable inference could be drawn that the use of the defendants' products produced asbestos dust that was inhaled by the decedent and thus the court determined that summary judgment was appropriate.¹²²

116. *Id.* The "job site" test was set forth in *Lockwood v. AC & S, Inc.*, 722 P.2d 826 (Wash. Ct. App. 1986), *aff'd en banc*, 744 P.2d 605 (Wash. 1987), and applied in *Richoux v. Armstrong Cork Corp.*, 777 F.2d 296 (5th Cir. 1985).

117. *Peerman*, 35 F.3d at 286. The test requiring proof of exposure to the asbestos-containing product was set forth in *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985).

118. *Peerman*, 35 F.3d at 287.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

SURVEY OF 1994 DEVELOPMENTS IN THE LAW OF PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

The law of professional responsibility underwent a remarkable modification during 1994. In years past, changes or refinements in the law governing lawyers came primarily through the vehicle of opinions from disciplinary cases handed down by the Indiana Supreme Court. During 1994, however, the court spoke on a broad number of topics through the use of its rule-making power. This Survey examines important developments both in the case law and the regulatory landscape governing members of the profession.

On the regulatory side, the bar paid great attention during 1994 to the promulgation process and the first year of operation of the Indiana Rules of Evidence. These rules are a synthesis of the Uniform Rules of Evidence, the Federal Rules of Evidence, case law and the thoughts of Indiana's bench and bar. For the first time, the state has a single body of rules to consult for guidance on evidentiary questions before and during litigation in all of the state's fora.

January 1994 also began the first year of operation for a new chapter in the Rules of Professional Conduct. Now, questions about the use of legal assistants can be analyzed under "guidelines" promulgated by the court. These guidelines unequivocally place the burden of supervision on the lawyer who employs the legal assistant.

Late in 1994, the supreme court also released a series of rule changes, with an effective date of February 1, 1995, which made significant changes in the law of professional responsibility. This Article will examine some of the rules that have a direct impact on the ethical environment in which attorneys practice. Although these latest rule changes deal with a variety of bodies of law, this Survey will examine only those that are likely to have a pronounced impact on the bar.

Important cases affecting lawyers are also covered in this Article. During this period, the court had occasion to opine on the components of a "reasonable" fee. Discussion follows about the regulatory landscape with respect to fees and the court's latest pronouncement on an unreasonable fee. Clearly, lawyers are not free to charge whatever they want and some examination will be given herein to the constraints placed on legal fees by the Rules of Professional Conduct and related law.

Finally, the Indiana Supreme Court has had an unfortunate number of opportunities in the recent past to discipline attorneys under Rule 8.2 of the Rules of Professional Conduct. This rule prohibits a lawyer from attacking members of the judiciary where the lawyer knows his comments are false. In addition, Rule 8.2 allows a lawyer to be

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sanctioned when he speaks with reckless disregard for the truth of his statements about judges. The use of this “reckless disregard” standard will be examined along with a review of the justifications used by many jurisdictions in upholding this formulation of the rule. This perceived limitation on a lawyer’s right to free speech has been the subject of considerable analysis by several state high courts and the United States Supreme Court. These cases demand review by Indiana lawyers who practice in court or before any tribunal, even on a limited basis.

I. CHANGES IN THE REGULATORY LANDSCAPE

A. *The Indiana Rules of Evidence*

The “new” Indiana Rules of Evidence (IREs) became effective on January 1, 1994.¹ The IREs were drafted by a committee appointed by the supreme court. They are based on a mixture of the Uniform Rules of Evidence, the Federal Rules of Evidence and existing Indiana law. The committee submitted the rules to the court with extensive commentary to explain the history of the rules and the committee’s position with respect to its proposals. However, the court did not adopt these commentaries in its final version of the rules.²

As a general observation, the IREs neither create nor aggravate any particular ethical dilemma. However, they demand increased scholarship and trial preparation by counsel and continuous communication between opposing lawyers during discovery and pretrial procedure.³

The IREs do not alter the impact of the state’s version of the Rules of Professional Conduct. For example, Rule 3.3(a) imposes four duties on the advocate practicing before a tribunal.⁴ The last of these, Rule 3.3(a)(4), prohibits the lawyer from offering false evidence and, in the event material evidence is offered that the lawyer knows to be false,

1. By order of the Supreme Court found at 615 N.E.2d 33 (Indiana Case Edition 1993).

2. *Id.*

3. For example, under IND. R. EVID. 609(b), a lawyer who intends to impeach the credibility of a witness by proving the witness’s prior conviction of a crime *more than ten years past* must advise the opposing lawyer *in writing* in advance of its use. The rule apparently contemplates that this notice will come well in advance of trial so that a hearing on its admissibility can be held.

In addition, with respect to certain hearsay exceptions governed by IND. R. EVID. 803, some “self-authenticating” documents must be provided to the opponent sufficiently in advance of trial to allow the opponent to form and present any objections prior to the document’s introduction. *See generally* IND. R. EVID. 901.

4. The full text of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1987) provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act against a tribunal by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or,

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

imposes a duty on the lawyer to take remedial measures. Specific examples of appropriate corrective measures for dealing with false evidence are suggested in the comment to the rule.⁵

The IREs, then, do not appreciably change the ethical landscape. They do, however, provide a more ordered analytical framework in which ethical questions can be evaluated.

B. Use of Legal Assistants

The supreme court added a new chapter to the Rules of Professional Conduct on January 1, 1994, which speaks to the lawyer's use of legal assistants.⁶ Guidelines 9.1 through 9.10 outline the court's expectations on the use of non-lawyers doing legal work.

One significant item in the Indiana version of these guidelines is not present in the American Bar Association's proposal. The supreme court added a preamble, which simply provides: "Subject to the provisions in Rule 5.3," all lawyers may use legal assistants in accordance with the following guidelines." The use of this language directly ties these guidelines to the Rules of Professional Conduct and, thereby, makes their terms an integral part of this body of law.

5. In addition to the rule's comment, an extensive, and illuminating, discussion of this problem can be found in 1 GEOFFREY HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§ 3.3:201-220 (1991 Supp.). This discussion includes analysis of the sometimes troubling question involving the distinction between what a lawyer knows versus what the lawyer may believe about the evidence in question. The authors also examine the topic in relation to the lawyer's duty of confidentiality under Rule 1.6 of the RULES OF PROFESSIONAL CONDUCT and under constitutional law.

6. The Indiana formulation of these guidelines does not define the term "legal assistant." However, the American Bar Association's MODEL GUIDELINES FOR THE UTILIZATION OF LEGAL ASSISTANT SERVICES (1991) notes that the ABA's Board of Governors approved the following definition in 1986:

A legal assistant is a person, qualified through education, training, or work experience, who is employed or retained by a lawyer, law office, governmental agency, or other entity in a capacity or function which involves the performance, under the ultimate supervision of an attorney, of specifically delegated substantive legal work, which work, for the most part, requires a sufficient knowledge of legal concepts that, absent such assistant, the attorney would perform the task.

7. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 5.3 (1987) provides:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) A lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

In addition, the Indiana version of Guideline 9.1 contains language intended to ensure that the legal assistant is working for a lawyer admitted to practice in Indiana.⁸ This language also prohibits the use of “independent legal assistants” to prevent the possibility of unregulated or unqualified individuals opening their own storefront operations and providing legal services.⁹ These concerns are not without foundation. Through the years, the supreme court has been called upon repeatedly to deal with questions surrounding the unauthorized practice of law. In *Professional Adjusters, Inc. v. Tandon*,¹⁰ Professional Adjusters, Inc. negotiated a settlement on behalf of the Tandons with their insurer after the Tandons’ home burned. In so doing, Professional Adjusters was relying on an act of the Indiana General Assembly that, in essence, allowed them to set up independent shops to serve as lay representatives using the title “Certified Public Adjuster.”¹¹ On transfer, the Indiana Supreme Court held that the acts of the General Assembly were unconstitutional under the separation of powers doctrine.¹² Under the Indiana Constitution, the Indiana Supreme Court is the only entity in the state that can admit attorneys to practice and discipline them for their misdeeds.¹³ Relying on Indiana common law going back to the 1890s, the court observed:

The practice of law is restricted to natural persons who have been licensed upon the basis of established character and competence as a protection to the public against lack of knowledge, skill, integrity and fidelity. Disbarment procedure is available in the case of those who do not conform to proper practice.¹⁴

The new guidelines for the use of legal assistants are closely tailored to prevent the unauthorized practice of law by non-lawyers, even when they are employed by lawyers.

8. The added language provides:

A legal assistant shall perform services only under the direct supervision of a lawyer authorized to practice in the State of Indiana and in the employ of the lawyer or the lawyer’s employer. Independent legal assistants, to-wit, those not employed by a specific firm or specific lawyers are prohibited.

INDIANA RULES OF PROFESSIONAL CONDUCT Guideline 9.1 (1994).

9. *Id.*

10. 433 N.E.2d 779 (Ind. 1982).

11. See IND. CODE ANN. § 27-1-24-1 to -9 (West 1981) (repealed).

12. *Professional Adjusters, Inc.*, 433 N.E.2d at 783.

13. IND. CONST. art. 7, § 4 provides:

The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction. The Supreme Court shall exercise appellate jurisdiction under such terms and conditions as specified by rules except that appeals from a judgment imposing a sentence of death, life imprisonment or imprisonment for a term greater than fifty years shall be taken directly to the Supreme Court. The Supreme Court shall have, in all appeals of criminal cases, the power to review all questions of law and to review and revise the sentence imposed.

14. *Professional Adjusters, Inc.*, 433 N.E.2d at 783.

Assuming the legal assistant works within the constraints spelled out by the court, the new guidelines allow for a vast delegation of tasks as long as the work is supervised by a member of the bar. The scope of this delegation of responsibilities is spelled out in guideline 9.2.¹⁵ It permits the delegation of virtually any legal task to the legal assistant as long as the delegation is not explicitly forbidden by another source of law. Guideline 9.3, meanwhile, identifies three areas of responsibility that may not be delegated to a legal assistant.¹⁶ The lawyer must maintain responsibility for the establishment of both the attorney-client relationship and the amount of the fee to be charged. There are legal considerations associated with these tasks that properly, and exclusively, belong to the lawyer.¹⁷ The third nondelegable task is the “*responsibility* for a legal opinion rendered to a client.”¹⁸ Indiana case law has long recognized that the core element of the practice of law is the giving of legal advice.¹⁹ The guidelines do not suggest that legal assistants cannot do research at a lawyer’s direction, nor do they prohibit the legal assistant from communicating the lawyer’s advice to the client. However, the guidelines, when coupled with Rule 5.3, make clear that the responsibility for the advice must be borne by the supervising lawyer.²⁰

The balance of the guidelines serve as a sort of abbreviated ethics code for legal assistants. The feature that most impacts the bar, however, is the requirement of direct supervision by a lawyer in the legal assistant’s day-to-day execution of law-related tasks.

15. INDIANA RULES OF PROFESSIONAL CONDUCT Guideline 9.2 (1993 Amendments) states:

Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a legal assistant any task normally performed by the lawyer, however, any task prohibited by statute, court rule, administrative rule or regulation, controlling authority, [or the] Indiana Rules of Professional Conduct may not be assigned to a non-lawyer.

16. INDIANA RULES OF PROFESSIONAL CONDUCT Guideline 9.3 (1993 Amendments) states: “A lawyer may not delegate to a legal assistant: (a) responsibility for establishing an attorney-client relationship; (b) responsibility for establishing the amount of a fee to be charged for a legal service; or, (c) responsibility for a legal opinion rendered to a client.”

17. Consider, for example, INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) (1994), which allows a lawyer to prospectively limit his malpractice liability, subject to certain conditions precedent, including advising the client to obtain independent representation before retaining the lawyer. A good illustration of the use of this rule is found in HAZARD & HODES, *supra* note 5, § 1.8:901. The authors posit that the use of this tool might be appropriate where the prospective client’s case is so fraught with risk that they might not find a lawyer to advocate their case without the limitation. These ultimate determinations must be left for the lawyer.

18. INDIANA RULES OF PROFESSIONAL CONDUCT Guideline 9.3 (1993 Amendment) (emphasis added).

19. See, e.g., *State ex rel. Disciplinary Comm’n v. Owen*, 486 N.E.2d 1012 (Ind. 1986). See also *In re Perrello*, 386 N.E.2d 174 (Ind. 1979); *Fink v. Peden*, 17 N.E.2d 95 (Ind. 1938); *Ely v. Miller*, 34 N.E. 836 (Ind. 1893).

20. Although the addition of these guidelines to the INDIANA RULES OF PROFESSIONAL CONDUCT (1993) is without comment, the American Bar Association’s MODEL GUIDELINES FOR THE UTILIZATION OF LEGAL ASSISTANT SERVICES (1991) contained extensive commentary on these points with references to authority from various states.

C. Certification and Marketing of Specialty Practice

The marketing of "specialty" practice by lawyers has been a goal of many in the bar for a considerable period of time.²¹ To that end, practitioners around the state have been working to create the mechanism for making the advertising of a particular lawyer's specialty a permissible marketing tool. Near the end of 1994, the supreme court, using its rule-making authority, took a significant step toward permitting advertising of a lawyer's "specialty."

Historically, lawyers who actively marketed their services were viewed as unethical by other members of the bar and subjected to disciplinary action.²² However, the United States Supreme Court, in *Bates v. State Bar of Arizona*,²³ found that commercial speech, even by lawyers, received limited protection under the First and Fourteenth Amendments to the Constitution. A string of decisions following *Bates*, has widened the scope of constitutionally permissible advertising by lawyers.

However, the Court did not address the notion of "specialization" by lawyers until its 1990 opinion in *Peel v. Attorney Registration and Disciplinary Commission of Illinois*.²⁴ In *Peel*, the lawyer was disciplined solely for stating on his professional letterhead that he was a "Certified Civil Trial Specialist" by the National Board of Trial Advocacy. Such a representation, although accurate, was prohibited under Illinois law. The Court, in a five-four decision, concluded that the representation was neither actually nor inherently misleading and that the State's interest in preventing possible deceptive advertising did not "rebut the constitutional presumption favoring disclosure over concealment."²⁵

Thus, the door was opened for states to create a regulatory scheme to allow qualified lawyers to market their skills as specialists.²⁶ The *Peel* decision itself led to an amendment to Rule 7.4 of Indiana's version of the Rules of Professional Conduct to permit a representation similar to the one at issue in the *Peel* case. However, Rule 7.4(a)(3) requires that any lawyer who qualifies for the use of the term "specialist" must also include with it the disclaimer that, "[t]he National Board of Trial Advocacy is a private organization not affiliated with or sanctioned by the State or Federal government."²⁷

21. For example, The ABA Comm. on Legal Ethics, Formal Op. 36 (1931) concluded, "An attorney's announcement card and professional card may not contain the information that the lawyer specializes in court work." This opinion interpreted CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

22. H. DRINKER, *LEGAL ETHICS* 211 (1953) summarizes the formerly prevailing attitude of the bar toward members who advertised ("A lawyer who advertises, solicits or steals another's clients is regarded by his brethren at the bar as one with whom it is not pleasant to associate on the terms of cordial intimacy characteristic of the relationship of lawyers to one another.").

23. 433 U.S. 350 (1977).

24. 496 U.S. 91 (1990).

25. *Id.* at 111.

26. See, John A. Payton, *Certification of Specialization: Another Limit on Attorney Advertising is Peeled Away*, 25 IND. L. REV. 589 (1991). This article contains an excellent description of the legal underpinnings that led to the Supreme Court's decision in *Peel* and the state of the law shortly thereafter.

27. The full text of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 7.4(a) (1987) identifies the state's

The new pronouncements from the Indiana Supreme Court delete the entire existing language of Rule 7.4 and authorize the lawyer to advertise himself as a specialist, subject to the provisions of Admission and Discipline Rule 30. Admission and Discipline Rule 30 is a completely new creation by the court entitled "Indiana Certification Review Plan."²⁸

In essence, the new rules give authority to the Indiana Commission for Continuing Legal Education (CLE) to create a list of (presumably non-governmental) certifying organizations. Under the "Powers" section of the rule, "CLE shall review, approve and monitor organizations [ICOs] which issue certifications of specialization to lawyers practicing in the State of Indiana to assure that such organizations satisfy the standards for qualification set forth in this rule."²⁹

The Commission for CLE has the duty to make qualitative judgments about the standards established by the various independent certifying organizations (ICOs) and determine whether each one will be permitted to certify "specialist" practitioners in Indiana. As a practical matter, this power is analogous to the authority the Commission for CLE currently possesses to develop a body of approved educational providers for lawyers.³⁰

Generally, the rule requires the ICO to meet six standards in order to qualify for recognition by the Commission for CLE. They are:

traditional recognition of specialists along with the *Peel* exception and provides, in full:

(a) A lawyer shall not hold himself out publicly as, or imply that he is, a recognized or certified specialist, except as follows:

(1) A lawyer admitted to practice before the United States Patent and Trademark Office may use the designation "Patents", "Patent Attorney", or "Patent Lawyer", or any combination of those terms, on his letterhead and office sign. A "Trademark Attorney", or "Trademarks Lawyer", or any combination of those terms on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty", "Proctor in Admiralty", or "Admiralty Lawyer", or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who practices in certain areas of law may hold himself out as practicing in those areas of law, but may not hold himself out as a specialist.

(3) A lawyer certified by the National Board of Trial Advocacy may include such certification on a letterhead or other communication so long as the following appears immediately thereafter: "The National Board of Trial Advocacy is a private organization not affiliated with or sanctioned by the State or Federal government."

28. The full texts of the new Rule 7.4 of the RULES OF PROFESSIONAL CONDUCT and Rule 30 of the INDIANA RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS follow this article as appendices A and B, respectively.

29. INDIANA RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS Rule 30 § 2 (1994). See Appendix B.

30. INDIANA RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS Rule 29 § 6 (1993), which refers to the powers of the Commission, provides, in pertinent part that the Commission may: "(a) [a]pprove all or portions of individual educational activities which satisfy the legal education requirements of this Rule; (b) [a]pprove sponsors whose educational activities satisfy the legal education requirements of this Rule."

- (a) The ICO shall encompass a comprehensive field or closely related group of fields of law so delineated and identified (1) that the field of certification furthers the purpose of the rule; and (2) that lawyers can, through intensive training, education and work concentration, attain extraordinary competence and efficiency in the delivery of legal services within the field or group.
- (b) The ICO shall be a non-profit entity whose objectives and programs foster the purpose of this rule and which is governed by lawyers who, in the judgment of CLE, are experts in the field of certification.
- (c) The ICO shall have a substantial continuing existence and demonstrable administrative capacity to perform the tasks assigned to it by this rule and the rules and policies of CLE.
- (d) The ICO shall adopt, publish and enforce open membership and certifications standards and procedures which do not unfairly discriminate against members of the Bar of Indiana individually or collectively.
- (e) The ICO shall provide the following assurance to the continuing satisfaction of CLE with respect to its certified members:
 - (1) that members have extraordinary competence and efficiency in the field of certification that is
 - (i) comprehensive;
 - (ii) objectively demonstrated;
 - (iii) peer recognized; and
 - (iv) reevaluated at appropriate intervals;
 - (2) that members actively and effectively pursue the field of certification as demonstrated by continuing education and substantial involvement; and
- (f) The ICO shall cooperate at all times with CLE and perform such tasks and duties as CLE may require to implement, enforce and assure compliance with and effective administration of this rule.³¹

It is apparent from the face of the rule that the ICO cannot simply pop into existence and promulgate standards for any purported specialization. The ICO itself must have a non-profit status and a substantial continuing existence. Obviously, from the structure of the rule, the supreme court intends for the certification of "specialists" to be more than a mere pro forma matter. Therefore, full operation of the rule, from the approval of ICOs to the actual certification of specialities and, ultimately, certification of lawyers, may take a significant amount of time.

The reformulation of Rule 7.4 of the Rules of Professional Conduct, meanwhile, will effectively do away with the required disclaimer contained in the prior language.³² Many

31. INDIANA RULES FOR ADMISSION TO THE BAR AND DISCIPLINE OF ATTORNEYS Rule 30, § 4 (1994 Amendments). *See Appendix B.*

32. *See supra* note 27.

states require lawyers to recite disclaimers in their advertising to temper sales pitches that might otherwise seem too enthusiastic about the quality of the lawyer's services.³³ The new configuration of Rule 7.4 apparently will do away with the existing disclaimer as the process of certifying specialties takes shape.

D. Contingent Fee Agreements

Another recent development worthy of note is a change to Rule 1.5(d) of the Rules of Professional Conduct, which will permit lawyers to charge on a contingency fee basis for some limited work in post-dissolution domestic relations cases. Under the former Code of Professional Responsibility,³⁴ contingent fee arrangements in domestic relations cases were frowned upon and heretofore, under the Rules of Professional Conduct,³⁵ these kinds of fee arrangements were forbidden. For the most part, contingent fee arrangements are still prohibited in domestic cases, but under the amended version of Rule 1.5(d),³⁶ the law now provides:

- (d) A lawyer shall not enter into an arrangement for, charge or collect:
 - (1) any fee in a domestic relations matter, the payment of which is contingent upon the securing of a dissolution, obtaining the custody of a child, the amount of support, or the measure of property settlement; or
 - (2) a contingent fee for representing a defendant in a criminal case.

This provision does not preclude a contract for a contingent fee for legal representation in a domestic relations post-judgment collection action, provided the attorney clearly advises his or her client in writing of the alternative measures available for the collection of such debt and, in all other particulars, complies with Rule of Professional Conduct 1.5(c).³⁷

33. Disclaimers have been a fairly popular mechanism for "warning" potential clients who have been solicited by lawyers. South Carolina, for example, requires lawyers to include a long litany of warnings when they directly solicit a prospective client in need of legal services. In addition to the litany, when the advertisement is written, the following language must also appear in the solicitation: "ANY COMPLAINTS ABOUT THIS LETTER (OR RECORDING) OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE, POST OFFICE BOX 11330, COLUMBIA, SOUTH CAROLINA, 29211-TELEPHONE NUMBER 803-734-1150. SOUTH CAROLINA APPELLATE COURT RULES Rule 7.3(c) (1993)."

Meanwhile, FLORIDA RULES OF PROFESSIONAL CONDUCT Rule 4-7.2 (West 1994) requires every lawyer advertisement to bear the legend: "The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience."

34. This body of law was repealed in 1987. Ethical Consideration 2-20 admonished the lawyer, "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." INDIANA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (West 1984).

35. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(d) (1987).

36. Effective February 1, 1995.

37. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(d) (1994), referring to Rule 1.5(c) (1994),

The result of this amendment is that lawyers may now find it economically sound to charge contingent fees in the collection of child support arrearage cases. The amendment, however, unequivocally states that the contingent fee representation must relate solely to a *post-judgment* collection matter. Obviously, the final order in the dissolution case must be entered before the lawyer undertakes any sort of collection matter on a contingency basis. The rule also mandates that the lawyer advise the client that "alternative measures" are available to collect the arrearages. Undoubtedly, these alternative measures encompass the child support collection process through the offices of the county prosecuting attorneys.

Finally, the rule does not require that a lawyer who undertakes a representation for this sort of collection matter charge on the basis of a contingent fee. In many cases, lawyers may determine that collection of a support arrearage will be more economically viable if done on the traditional basis of an hourly rate. Nothing in the amendment appears to either encourage or dissuade lawyers from undertaking a collection matter on a fee agreement based on the lawyer's billable hours.

II. INDIANA CASES OF NOTE

A. Disciplinary Cases Arising out of Fees Charged

1. *Background*.—Both the former Code of Professional Responsibility³⁸ and the current Rules of Professional Conduct³⁹ impose limits on the fees charged by lawyers for their services. The Indiana Supreme Court has issued few decisions that thoroughly analyze the disciplinary implications of the fees charged by attorneys.⁴⁰

However, during 1994, the Indiana Supreme Court decided two cases involving the issue of the reasonableness of fees charged to clients. The first, *In re Gerard*,⁴¹ addressed the issue in the context of a contingency fee arrangement, while the second, *In re Putsey*,⁴² required the court to apply Rule 1.5(a)⁴³ to a fixed fee arrangement.⁴⁴

2. *The Cases*.—In *In re Gerard*,⁴⁵ William Gerard, an attorney licensed to practice in Indiana, Illinois, Wisconsin and Missouri, was charged with violations of the Code of Professional Responsibility in regard to his representation of an elderly Illinois woman in 1985. As a result of his conduct, Gerard was suspended from the practice of law for

requires all contingent fee contracts to be in writing, and include an explicit description of the fee structure and a written statement at the end of the representation describing how monies collected are paid out.

38. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY (repealed 1986).
39. INDIANA RULES OF PROFESSIONAL CONDUCT (1987).
40. See *In re Jarrett*, 602 N.E.2d 131 (Ind. 1992); *In re Smith*, 572 N.E.2d 1280 (Ind. 1991); *In re Brown*, 511 N.E.2d 1032 (Ind. 1987); *In re Stanton*, 492 N.E.2d 1056 (Ind. 1986).
41. 634 N.E.2d 51 (Ind. 1994).
42. 634 N.E.2d 497 (Ind. 1994).
43. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (West 1994).
44. Putsey was also accused and found guilty of violating INDIANA RULES OF PROFESSIONAL CONDUCT Rules 1.3 & 1.4(a) (1987). *In re Putsey*, 634 N.E.2d at 499.
45. *In re Gerard*, 548 N.E.2d 1051 (Ill. 1989).

one year by the Illinois Supreme Court,⁴⁶ and was also disciplined by the Supreme Courts of Missouri and Wisconsin.⁴⁷

Respondent Gerard was hired in August 1985 by Ruth Randolph ("Randolph") who, at the age of eighty-four, was hospitalized and wanted respondent to recover several certificates of deposit that she believed had been either lost or stolen. After respondent explained that Randolph could be charged either an hourly rate or on a contingency fee basis, Randolph agreed to a contingency fee arrangement whereby respondent was to receive one-third of all assets recovered.

During the next month, respondent contacted the lending institutions Randolph believed had issued the certificates of deposits to her, and discovered twenty-three certificates with a total value of \$453,443.37. Respondent cashed thirteen of the certificates and transferred the proceeds to a pour-over trust. He also cashed the other ten certificates of deposit and kept the proceeds of \$159,648.60 as his fee. Respondent claimed that he spent one hundred and sixty hours in these efforts.

The Indiana Supreme Court found that respondent violated Disciplinary Rule 2-105(A), which provides that a lawyer "shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."⁴⁸ The court acknowledged that while no precise definition of an excessive fee exists, a fee is clearly excessive if a lawyer "of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."⁴⁹ The court considered the factors enumerated in Disciplinary Rule 2-105(B) in reaching its decision:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.⁵⁰

In reaching its decision to impose a one-year suspension, the court considered that excessive cost deters the public from using the legal system⁵¹ and also looked to the evidence that related to some of the factors in Disciplinary Rule 2-105(B). The court

46. *Id.*

47. *In re Gerard*, 634 N.E.2d 51 (Ind. 1994). By virtue of being disciplined in another state, respondent was subject to discipline in Indiana. INDIANA RULES FOR ADMISSION AND DISCIPLINE OF ATTORNEYS Rule 23, § (2)(b) (1994).

48. *In re Gerard*, 634 N.E.2d at 52 (citing INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) (repealed 1986)).

49. *Id.* (citing INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(B) (repealed 1986)).

50. *Id.* at 52-53.

51. *Id.* at 53 (citing *In re Smith*, 572 N.E.2d 1280, 1288 (Ind. 1991)).

concluded that locating and collecting the certificates of deposit did not take significant time or labor, presented no novel legal issue, took no real legal skill, and did not preclude respondent from taking on other legal matters.⁵²

Of particular note was the court's conclusion, contrary to that of the hearing officer, that an independent violation of Disciplinary Rule 1-102(A)(4),⁵³ which prohibits respondent from engaging in conduct involving fraud, deceit or misrepresentation, had occurred. While the hearing officer found no evidence that the respondent knew at the outset of the representation that it would be a simple matter, the court determined that the respondent's failure to renegotiate his fee was a fraudulent act after he realized that his client's entitlement to the certificates was undisputed.⁵⁴

The Indiana Supreme Court dealt with a recurring, fee-related issue in *In re Putsey*.⁵⁵ On May 7, 1992, respondent, Albert Putsey, met with Doris Weaver ("Weaver") to discuss respondent's representation of Weaver in a bankruptcy petition. Weaver was familiar with the bankruptcy process and brought with her all the information necessary to prepare the petition. Respondent was hired and was paid a partial payment of \$240 toward a total fee of \$550. Despite numerous requests to prepare the bankruptcy petition, respondent refused to take action. In July, creditors continued to harass her at work, and her automobile was repossessed.

By February 1993, within days of learning about Weaver's grievance filed with the Disciplinary Commission, respondent personally appeared at Weaver's apartment and again obtained the information necessary to file the bankruptcy petition. He promised he would have the materials ready for Weaver to sign by the following week. However, respondent never prepared the petition. Eventually, Weaver hired other counsel to file the bankruptcy. The week before his disciplinary hearing, Putsey returned the \$240 advance.

While finding that respondent was not diligent and that he failed to keep his client reasonably informed, the court determined that he did not charge an unreasonable fee in violation of Rule 1.4(a). The court explained:

Respondent failed to act with reasonable diligence and failed to keep his client reasonably informed about the status of the case, but such misconduct does not establish that the fee initially assessed was inappropriate. The issues of diligence and response are questions of performance. The [criteria] to determine the reasonableness of a fee for legal services . . . measure the value of the service. Here, the fee assessed by Respondent and agreed to by his client was an appropriate measure of the value of the anticipated services.⁵⁶

52. *Id.*

53. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (repealed 1986) provided that it was professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. This language tracks with the more recent INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1987).

54. *In re Gerard*, 634 N.E.2d at 53.

55. 634 N.E.2d 497 (Ind. 1994).

56. *Id.* at 498-99.

3. *Analysis.*—Historically, contingency fee contracts like the one used in *In re Gerard* were illegal in Indiana.⁵⁷ These early cases held that contingency fee agreements were void for being champertous as the contract provided for the attorney to receive a part of the recovery for his fee. Entering into a champertous agreement was a common law crime.⁵⁸ However, in *Draper v. Zebec*,⁵⁹ the Indiana Supreme Court conclusively accepted the more modern view, recognizing that contingency fee contracts were an important avenue for citizens to obtain access to legal services because “persons who have rights, but no means to pursue them, are obliged to resort to this means of procuring legal redress.”⁶⁰

Of course, this general acceptance of contingency fee contracts was not a recognition that all contingency fee contracts are valid. Along with fees that are clearly excessive⁶¹ or unreasonable,⁶² agreements contingent on securing a divorce,⁶³ or obtaining a particular outcome in a criminal matter⁶⁴ are prohibited. In addition, a fee can be illegal by its very nature.⁶⁵

In *In re Gerard*, there was no allegation that the contract itself was illegal. The court looked to the self-explanatory factors enumerated in Disciplinary Rule 2-105⁶⁶ and applied those factors to the contingency fee contract. While it is not clear from *In re Gerard* which factor or factors played the more dominant role, the court was most concerned with the simple nature of Gerard’s task and the relatively short amount of time he needed to complete it. No real legal skill was required in finding and gathering the assets.⁶⁷ These facts made respondent’s effective rate of \$997 per hour offensive to the court and a violation of the Code.⁶⁸

57. See *Scobey v. Ross*, 13 Ind. 117 (Ind. 1859). See also *French v. Cunningham*, 149 Ind. 632 (Ind. 1898).

58. In *Barelli v. Levin*, 247 N.E.2d 847 (Ind. App. 1969), the court explained the difference between a truly champertous contract and a permissible contingency fee contract. While an agreement that provided for a percentage of the recovery was illegal, a contingency fee providing for a *sum equal to* a percentage of the recovery was not considered champertous. *Id.*

59. 37 N.E.2d 952 (1941), *overruled on other grounds*, *O’Donnell v. Krneta*, 154 N.E.2d 45 (1958).

60. *Id.* at 957.

61. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105 (repealed 1986).

62. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1987).

63. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(1) (1987). See also *Mason v. Mason*, 561 N.E.2d 809 (Ind. App. 1990).

64. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) & 1.5(d)(2) (1987).

65. See *In re Payne*, 494 N.E.2d 1283 (Ind. 1986) (holding that receiving cocaine as partial payment for legal services violates INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A)).

66. There is little difference between INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (1987) and INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(A) & (B) (repealed 1986). As other commentators have noted, the Code provided that the factors helped answer the question of whether a “lawyer of ordinary prudence” would definitely believe that the fee was unreasonable or excessive. The INDIANA RULES OF PROFESSIONAL CONDUCT consider similar factors as more objective criterion. HAZARD, *supra* note 5, § 1.5:201.

67. *In re Gerard*, 634 N.E.2d 51, 53 (Ind. 1994). See *supra* notes 45-54 and accompanying text.

68. This amount is derived from dividing respondent’s fee of \$159,648 by his claim that he spent 160

Most significant is the fact that the court, contrary to the hearing officer's findings,⁶⁹ determined that an independent violation of Disciplinary Rule 1-102(A)(4) had occurred.⁷⁰ The court found respondent's acts to be fraudulent because respondent did not renegotiate the fee after realizing that his client's access and rights to the certificates were not in doubt. Instead, after learning that the matter would be a simple, uncontested matter, he accepted an inflated fee and did not return any of the fee until after a lawsuit was filed against him to obtain a partial refund.

In reaching the conclusion that this failure to act constituted fraud, the court explained that disciplinary proceedings are neither civil nor criminal and that civil or criminal definitions of fraud do not apply in the disciplinary context.⁷¹ Implicit in respondent's retention of the fee was a false representation that the service he provided to his client corresponded to the amount of compensation he was owed.⁷²

Thus, the importance of *In re Gerard*, aside from its application of the factors in Disciplinary Rule 2-105, is its warning to lawyers that an affirmative duty exists to refund excessive fees obtained from an otherwise valid contingency fee contract.⁷³ Rather than being a new and unexpected development in the law, this decision merely flows from the common law developed before the Code of Professional Responsibility took effect that a lawyer could be sued for grossly excessive fees.⁷⁴ As a result, lawyers should be cautious about holding onto windfalls obtained during a contingency fee representation.

In *In re Putsey*, the court did not find it necessary to apply any of the factors present in Rule 1.5(a) because the court found that "the fee assessed by [r]espondent and agreed to by his client was an appropriate measure of the value of the anticipated professional services."⁷⁵ Thus, it appears that the court could determine that charging a fee and not doing any work does not violate Rule 1.5(a)'s prohibition against charging an unreasonable fee.

The difficulty with the decision is that it conflicts with two other disciplinary cases that address the same issue. The first, *In re Shaul*,⁷⁶ involved an attorney's representation of an estate. Shaul was hired to represent the estate of Erma Hill and her husband Herbert. Despite reasonable requests for information, Shaul did not diligently proceed with the estates nor provide information about them to the heirs. Furthermore, while he did not provide an accounting of the estates, he nonetheless paid himself attorney's fees

hours in the case. The court also seemed to question Gerard's claim that he spent 160 hours on the case. *In re Gerard*, 634 N.E.2d at 53.

69. *Id.*

70. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4) (repealed 1986) provides that it is misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. There is a parallel provision in the INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1987).

71. *In re Gerard*, 634 N.E.2d at 53 (citing *In re Roberts*, 442 N.E.2d 986 (Ind. 1983)).

72. *Id.*

73. For the other limitations imposed upon contingency fee agreements, see the text of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1987).

74. HAZARD & HODES, *supra* note 5, § 1.5:201.

75. *In re Putsey*, 634 N.E.2d 497, 499 (Ind. 1994).

76. 592 N.E.2d 687 (Ind. 1992).

totaling \$3100.⁷⁷ The supreme court determined that “[i]n light of the fact that he failed to complete the services for which he was hired, the respondent’s fee was clearly excessive and in violation of [Disciplinary Rule] 2-105(A).”⁷⁸

*In re Jarrett*⁷⁹ applied similar reasoning to an alleged violation of Rule 1.5. In *In re Jarrett*, respondent was accused of taking an advance of \$1500 to prosecute a wrongful termination action against his client’s employer.⁸⁰ The court found that Jarrett collected an unreasonable fee when he received the \$1500 and performed virtually no services.⁸¹

In re Jarrett and *In re Shaul* clearly differ from the result reached in *In re Putsey*. By holding that collection of a fee while providing no services violated the prohibition against charging an unreasonable fee, Rule 1.5 was expanded in *In re Jarrett* and *In re Shaul* to include conduct that is already covered by other rules. This was illustrated in *In re Jarrett* where the respondent was also found to have violated Rule 1.3, by not acting diligently, Rule 1.4, by not providing his client with sufficient information, and Rule 3.2, by failing to expedite the litigation. Those rules are sufficient to reach Jarrett’s conduct, just as the violation of those same rules by Putsey was sufficient to discipline him and suspend him for six months. Further clarification from the Indiana Supreme Court is necessary to resolve this conflict in the cases and to determine the actual scope of Rule 1.5 as it applies to fees collected in cases where little or no work is performed by the lawyer.

B. Attorney Criticism of the Judiciary

1. *Background*.—In 1994, the Indiana Supreme Court addressed the issue of attorney speech to and about the judiciary on no less than three occasions. In *In re Garringer*,⁸² *In re Turner*,⁸³ and *In re Atanga*,⁸⁴ attorneys made statements directed to or about a tribunal that were later determined to undermine the integrity of the judicial system. In two of the three cases, the attorneys were charged with violating, among other rules, Rule of Professional Conduct 8.2(a) for making statements about judges with reckless disregard for the truth or falsity of those statements.⁸⁵ It is unusual that the supreme court would

77. *Id.* at 688-89.

78. *Id.* at 689.

79. 602 N.E.2d 131 (Ind. 1992).

80. The verified complaint filed against Jarrett had seven separate counts. The conduct addressed here is only that which relates to Count I. While Count III also contained allegations that Jarrett violated INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1987), the court specifically found that the amount of fees collected during the course of the estate administration was unreasonable in light of the simplicity of the issues involved. *In re Jarrett*, 602 N.E.2d at 134. Thus, the court appears to be giving particular weight to that factor of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 1.5 that considers the length and difficulty of the issues involved in the case.

81. *In re Jarrett*, 602 N.E.2d at 133.

82. 626 N.E.2d 809 (Ind. 1994), *cert. denied*, 115 S. Ct. 93 (1994).

83. 631 N.E.2d 918 (Ind. 1994).

84. 636 N.E.2d 1253 (Ind. 1994).

85. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1987) provides:

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal

have three opportunities in the space of one year to opine on the issue of attorney speech and how far an attorney may go in speaking about, or to, a tribunal before that speech is considered misconduct.⁸⁶ Members of the Bar must now study these opinions and apply them to their own daily practice, both in and out of the courtroom. The distinctions between these cases and their impact on practicing attorneys will be examined in this subpart.

2. *Facts.*—The earliest of the three 1994 decisions was *In re Garringer*.⁸⁷ In *In re Garringer*, the respondent lawyer was counsel for a couple seeking relief under the bankruptcy code. At some point, Garringer distributed an “open statement” charging officials in both the United States Bankruptcy Court and the Federal District Court for the Southern District of Indiana with misconduct. The statement charged that members of the judiciary, bankruptcy trustees, United States Attorneys and others participated in a conspiracy to “loot” bankruptcy estates. The statement was distributed to the President of the United States and other federal and state officials with the explanation that Garringer had exhausted all forms of relief available to him to expose this conspiracy, to no avail.

Garringer was charged with violating Rule 8.2(a) of the Rules of Professional Conduct along with two other violations.⁸⁸ The Hearing Officer appointed to the case found that Garringer violated Rule 8.2(a) by making statements regarding the integrity of judges and other adjudicatory officers with reckless disregard as to the statements’ truth or falsity.⁸⁹ The lawyer challenged the Hearing Officer’s findings, asserting that no evidence presented at trial proved that he made the statement public, and that he had done

office.

86. The timing is particularly unusual when considered in light of the fact that in September 1993, the court decided *In re Becker*, 620 N.E.2d 691 (Ind. 1993). In *In re Becker*, a lawyer was accused of violating INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) among other violations. The charges stemmed from Becker’s role as counsel in an adoption matter in which competing adoption petitions had been filed. During a hearing on the petitions, it was discovered that one witness’s testimony had not been tape recorded as had the rest of the proceedings. Neither party elected to recall the witness to have the testimony recorded, although the judge offered to allow the parties to do so. Becker’s client’s petition was later denied by the judge, and Becker filed an appellate brief in the Indiana Court of Appeals in which Becker accused the trial judge of misconduct in handling the matter. The appeal was dismissed. Shortly thereafter, in a newspaper interview, Becker questioned the objectivity of the court of appeals. The supreme court found that Becker had made statements in the brief and to the newspaper questioning the integrity of a judge which he knew to be false or with reckless disregard for their truth or falsity in violation of INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.2(a). The court issued a thirty-day suspension. *In re Becker*, 620 N.E.2d at 693. It also found that Becker pursued a claim of judicial misconduct improperly, stating that when an attorney faces what appears to be judicial misconduct, the appropriate course of action is to report such conduct to the Judicial Qualifications Commission. *Id.* at 694. Thus, in the span of ten months, the supreme court actually issued four opinions that touched upon the issue of attorney speech to, or about, a member of the judiciary.

87. *In re Garringer*, 626 N.E.2d 809, 810 (Ind. 1994).

88. INDIANA RULES OF PROFESSIONAL CONDUCT Rule 8.2(a) (1987). Garringer was also charged with violating INDIANA RULES OF PROFESSIONAL CONDUCT Rules 3.5(c) & 8.4(d) (1987). These violations will not be considered in this discussion.

89. *In re Garringer*, 626 N.E.2d at 811-12.

nothing more than report the alleged misconduct to the proper authorities. Garringer reasoned that reporting misconduct to the authorities did not serve to undermine the public's confidence in the judiciary.⁹⁰ The court found that the language of the rule does not require that a statement be made to the public at large in order to be considered "public" but only that the statement be made to another individual.⁹¹ In addition, the court found that distribution of the statement to a number of individuals, including the President of United States and the Director of the FBI, constituted the making of a public statement under the terms of Rule 8.2(a).⁹²

Garringer further challenged the conclusion that he violated Rule 8.2(a). He asserted he was deprived of proper notice of the charges when the Disciplinary Commission's complaint was impliedly amended. Garringer alleged that this occurred when the Hearing Officer struck language in the Complaint that charged him with violating Rule 8.2(a) for making statements with knowledge of their falsity concerning the integrity of a judge and other judicial officers. Garringer contended he was prepared to offer evidence of the truth of the allegations contained in his open statement, and, when the verified complaint was amended, he was denied notice of the fact that the Disciplinary Commission intended to present proof that he made the statements with reckless disregard to their truth or falsity. The supreme court found this argument to be without merit, noting that the verified complaint contained language regarding reckless disregard both before and after the Hearing Officer amended the verified complaint.⁹³

Garringer alleged that he was denied due process because he was not allowed to present proof concerning the truth of the information in the open statement. He maintained that because the information was true, he was duty bound to report the conduct of the judges and other officials to the proper authorities. The supreme court agreed with the Hearing Officer's finding that, because there was absolutely no factual basis or reliable evidence presented by Garringer to support his conspiracy theory, he made the statements with reckless disregard for their truth or falsity. Therefore, the procedural deficiencies argument that Garringer asserted had no merit.⁹⁴

The supreme court found Garringer had, in fact, violated the Rules of Professional Conduct. It determined that he violated his duty as an attorney to refrain from acting in a way that damaged the integrity of the judicial system.⁹⁵ The court also found that although Garringer's conduct did no harm to any particular client, it did threaten to undermine the general public's confidence in the administration of justice.⁹⁶ The court imposed a sixty-day suspension, stating that a short period of suspension adequately addressed the severity of the misconduct and also served as a message to the Bar generally

90. *Id.* at 812.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 813.

95. *Id.*

96. *Id.* The court relied on *In Re Terry*, 394 N.E.2d 94 (Ind. 1979), for the proposition that when an attorney makes an unsubstantiated public suggestion that a judge or a judicial officer is motivated by improper influences, it weakens the public's confidence in the impartiality of the judicial process.

that the court would not tolerate its members making unsubstantiated claims about the judiciary.⁹⁷

In March 1994, the supreme court decided *In re Turner*.⁹⁸ *In re Turner* can be differentiated from the other cases reviewed in that the lawyer did not make statements *about* a member of the judiciary; he made statements *to* a member of the judiciary that directly resulted in charges of misconduct by the Disciplinary Commission. The incident grew out of Turner's appearance in a matter pending in a Marion County small claims court. A default judgment was entered prior to the time Turner undertook the representation. Upon entering his appearance, Turner filed a motion to vacate the default judgment and a hearing was scheduled on the matter.

On the hearing date, Turner and his client arrived and discovered that a judge pro tempore was presiding. The attorney representing the plaintiff in Turner's case, an apartment complex, also had numerous other cases on the docket. When that attorney arrived, he began calling individual defendants into a room to discuss settlement of their cases, in accordance with that court's policy that settlement be discussed in all such matters prior to trial.

After waiting a period of time, Turner asked when his case would be heard and if he could speak to the judge. Turner was told he would have to speak with opposing counsel before the matter could be heard. Some time later, when opposing counsel came into the reception area where Turner and his client were waiting, Turner objected to the amount of time he had been waiting and to the amount of control the other attorney exerted over the proceedings. Turner then referred to the court as a "Mickey Mouse Court." Turner and his client left the court prior to their case being heard. His motion to vacate the default judgment was denied based upon pleadings previously submitted.

A subsequent hearing was held, at which the same judge pro tempore presided. While the judge was issuing her ruling, Turner got up, approached the bench, and objected to the judge's ruling. Turner called the judge's ruling "ridiculous" and objected to her further involvement in the matter in light of the fact that she had been named in a grievance filed by Turner.

The supreme court, in a three-two decision, found Turner had committed misconduct by violating Rules of Professional Conduct 3.5(c) and 8.4(d).⁹⁹ The majority determined that, while it may be appropriate for settlement to be promoted in a court prior to undertaking a contested hearing, the most important consideration is that a judge maintain absolute control over the court and the proceedings at all times to avoid the appearance of partiality toward any attorney.¹⁰⁰ Although the majority determined that the judge pro tempore failed to exercise proper control over the court, it further held that such a lapse did not excuse the lawyer's behavior toward the court.¹⁰¹ The court determined that Turner owed a duty to preserve the integrity of the profession and the courts regardless of his opinion of a particular court or judge; he could have served his client's interests and

97. *In re Garringer*, 626 N.E.2d at 812.

98. 631 N.E.2d 918 (Ind. 1994).

99. *Id.* at 919. The majority consisted of Justices Dickson, Givan and DeBruler, while the two dissenting opinions were issued by Chief Justice Shepard and Justice Sullivan.

100. *Id.*

101. *Id.*

protested the procedures he observed no less effectively by patient firmness than by belligerence and theatrics.¹⁰²

The dissenting opinions by Chief Justice Shepard and Justice Sullivan recommended that no misconduct be found. They stated that the atmosphere leading to Turner's outburst was created by the court and the other attorney, neither of whom was disciplined.¹⁰³

The most recent Indiana case that considers the issue of attorney speech regarding a member of the judiciary is *In re Atanga*.¹⁰⁴ Atanga, a lawyer, represented a criminal defendant in Tippecanoe County. In 1991, the defendant had two criminal cases pending; one case dealt with an alleged probation violation and attempted revocation, and the second case involved drug-related charges that had not yet been brought to trial. Atanga appeared during the pendency of both cases. At a bond reduction hearing he told the judge that he had a scheduling conflict on the date of the probation revocation hearing, and asked that the date be moved. The judge then reset the probation revocation hearing to accommodate Atanga.

Thereafter, a Tippecanoe County Deputy Prosecutor appeared before the judge without prior notice to Atanga and made an oral motion to reset the probation revocation hearing back to its original date. The reason offered was that the state's expert witness previously had been subpoenaed to appear and could not be present on the new date. The judge granted the state's motion, and prepared an order to that effect. One day prior to the probation revocation hearing, Atanga submitted a motion to continue the probation revocation hearing. During a telephone conversation between the judge and lawyer that same day, Atanga told the judge that he would not be present at the probation revocation hearing because of his previously identified scheduling conflict. The judge informed Atanga that if he was not present in court the next day, he would be held in contempt of court.

On the date of the probation hearing Atanga did not appear. At the conclusion of the hearing, the judge ordered that Atanga appear at a show cause hearing to offer reasons as to why he should not be held in contempt. Notice of the judge's order was sent to Atanga at his office by certified mail; however, he failed to appear at the show cause hearing. As a result of this second failure to appear, the judge issued a body attachment for Atanga. Thereafter, Atanga was taken into custody and placed in the county jail to await his hearing. Both Atanga and his client were brought before the judge in a courtroom inside the jail, and Atanga was found to be in contempt of court for his previous failure to appear.

In the January 1992 edition of a small Lafayette news publication, Atanga gave an interview about his experience.¹⁰⁵ He was quoted as stating that he thought the judge was "ignorant, insecure and a racist. He is motivated by political ambition."¹⁰⁶ Atanga also

102. *Id.*, (citing INDIANA RULES OF PROFESSIONAL CONDUCT Rule 3.5 (Comment) (1987)).

103. *Id.* at 920.

104. 636 N.E.2d 1253 (Ind. 1994).

105. *Id.* at 1256.

106. *Id.*

stated that he considered “the errors and omissions in the record to be part of a systematic effort to confuse the defense and cover up the Judge’s actions.”¹⁰⁷

In a three-two decision, the respondent lawyer was found by the Indiana Supreme Court to have violated, *inter alia*, Rule of Professional Conduct 8.2(a) and was suspended from the practice of law for thirty days.¹⁰⁸ Although the court discussed other rule violations, the opinion focused primarily on the violation of Rule 8.2(a) as it related to Atanga’s commentary in the newspaper. The court determined that the Disciplinary Commission had not attempted to demonstrate that Atanga intentionally had made a statement known to be false, but instead had shown that his statements were made with reckless disregard to their truth or falsity.¹⁰⁹ The court determined that the “reckless disregard” language of the rule was the focus of the Disciplinary Commission’s case. Therefore, the Hearing Officer’s decision to exclude, on relevancy grounds, Atanga’s evidence regarding the truth of his commentary was proper.¹¹⁰ The majority also found that Atanga had reason to complain about the administration of the underlying criminal matter and about his treatment at the jail; however, such treatment did not justify criticism of the court and the judge as an institution.¹¹¹ The court concluded that had Atanga confined his comments directly to the criminal case and the events that had occurred, no finding of misconduct could have been made under the rule. However, when he made statements in the newspaper that drew disfavor on the integrity of the court, there was no basis to conclude that his comments were anything but reckless.¹¹² The majority determined that Atanga’s misconduct was directed toward the administration of justice, and concluded that courts cannot function properly if the attorneys who come before them have the option of denying their authority.¹¹³

Chief Justice Shepard and Justice Sullivan dissented. The Chief Justice found that while he agreed with the majority that misconduct occurred, the thirty-day suspension imposed was “more than the facts warrant[ed].”¹¹⁴ Justice Sullivan opined that, not only was the sanction grossly disproportionate to the alleged misconduct, there was no demonstration that the Disciplinary Commission had met its burden of proof.¹¹⁵ Justice Sullivan further determined that, even assuming Atanga did violate Rule 8.2(a), his conduct had caused no actual injury and the majority had not taken into consideration any mitigating factors in determining an appropriate sanction.¹¹⁶

After the supreme court issued its opinion in this matter, Atanga filed a petition for rehearing with the court. In another three-two decision, the court denied the respondent’s petition.

107. *Id.*

108. *Id.* at 1258.

109. *Id.* at 1257.

110. *Id.*

111. *Id.* at 1258.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1260.

116. *Id.*

3. *Analysis.*—Although these decisions do not deal exclusively with violations of Rule 8.2(a), they all reach the issue of how freely an attorney may speak to, or about, the courts and judges. These decisions have a potential impact on the practice of every attorney who works before a tribunal. These cases, particularly *In re Atanga*, have been the topic of much discussion among lawyers since their publication. The primary questions associated with these cases are: (1) Was any new pronouncement made or was the court simply reiterating an established rule of law governing an attorney's right to speak? (2) What practical effect do these decisions have on an attorney's right to speak freely to or about a member of the judiciary? and (3) Is an attorney's right to speak significantly more limited than that of the lay public?

Substantial precedent exists regarding limitations on an attorney's right to free speech. In 1959, the United States Supreme Court commented in *In re Sawyer*¹¹⁷ on an attorney's right to unfettered free speech regarding the judiciary. In *In re Sawyer*, an attorney involved in defending a Smith Act case made a public comment criticizing the course that Smith Act cases had generally followed. She stated that there was no such thing as a fair trial in a Smith Act case, that the rules of evidence must be abandoned, and that some "rather shocking and horrible things . . . go on at the trial." She was sanctioned for her comments, and appealed to the United States Supreme Court. The Court stated that "lawyers are free to criticize the state of the law" and that such criticism is not the same as an attack on the motivation, integrity or competence of a judge personally.¹¹⁸ The Court also held that "[t]o say that 'the law is a[n] ass, a[n] idiot' is not to impugn the character of those who must administer it."¹¹⁹ The Court also stated that a lawyer's statement indicating that a judge is wrong is not considered improper because appellate courts and law reviews say such things on a daily basis; only when an attorney goes beyond that, to a commentary of a personal nature, is there cause for disciplinary action.¹²⁰

Traditionally, two bases are offered for the regulation of an attorney's First Amendment right to free speech regarding members of the judiciary. The first reason is the need to maintain public confidence in the judiciary. In 1979, the Indiana Supreme Court, in *In re Terry*,¹²¹ adopted this line of thought. In *In re Terry*, the respondent lawyer was charged with making false statements about a judge in correspondence directed to various public officials throughout Indiana. He defended his assertions, stating that he reasonably suspected that a conspiracy had been formed, and that his comments were permitted under the First Amendment. The court rejected this argument, and determined that "[u]nwarranted public suggestion by an attorney that a judicial officer is motivated by criminal purposes and considerations does nothing but weaken and erode the public's confidence in an impartial adjudicatory process."¹²² The court also found that professional misconduct, although affecting individuals, is not sanctioned for the benefit of those individuals; instead, the violation committed is a violation against society, and the judicial

117. 360 U.S. 622 (1959).

118. *Id.* at 631-32.

119. *Id.* at 634.

120. *Id.* at 636.

121. 394 N.E.2d 94 (Ind. 1979).

122. *Id.* at 96.

system as a whole.¹²³ In *In re Terry*, the comments made by the respondent both to and about the judiciary were determined by the court to weaken public confidence in the judicial system in general. The court indicated that the state's interest in protecting and defending its public officials and maintaining the integrity of the judicial system overrides an attorney's unrestricted right of free speech regarding judicial officers.¹²⁴

A second basis offered for regulation of attorney speech is that, as an officer of the court, a lawyer relinquishes some aspects of his right to unrestricted free speech upon entering the profession. This position is supported by the language of the 1991 case of *Gentile v. State Bar of Nevada*.¹²⁵ In *Gentile*, Justice Sandra Day O'Connor joined in a portion of Chief Justice William Rehnquist's dissent, to create a majority of the Court supporting the view that: "Lawyers are officers of the courts and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies."¹²⁶ In other words, a lawyer's speech can be restricted if the state can show that a legitimate interest exists upon which to base the restrictions.

Gentile and its progeny provide that there are legitimate state interests that constitutionally permit some limitation on a lawyer's right to free speech. The state interest in question is the necessity of maintaining public confidence in the judicial system and protecting it from reckless or unfounded charges. This protection is maintained because the justice system is the ultimate protector of constitutional rights. Attorneys, as officers of the courts, have a unique point of view of how the judicial system works and where its deficiencies lie. However, lawyers are also unique in that they have taken an oath, a social contract of sorts, in which they agree to uphold and maintain the respect due to courts and judicial officers. The *Gentile* Court's view seems to be that no one is compelled to become a lawyer, but when a person takes the oath to become an attorney, he or she gives up a measure of the rights afforded to a layperson.¹²⁷

The Nevada Supreme Court provided a good discussion of the state's interest in *In re Raggio*.¹²⁸ In *In re Raggio*, the court determined that the right of free speech does not give a lawyer the right to openly denigrate the court in the eyes of the public.¹²⁹ As justification for this determination, the court discussed the role of the courts and the judicial system in our society, stating that, "[t]he controlling authority of law must be recognized if we are to endure as a nation. The courts are the symbolic representatives of law and must be allowed to do their duty."¹³⁰ The court further held that:

Every licensed attorney knows that he belongs to a profession with inherited standards of propriety and honor which experience has shown necessary in a

123. *Id.* at 95.

124. *Id.* at 96.

125. 501 U.S. 1030 (1991).

126. *Id.* at 1081-82 (O'Connor, J., concurring).

127. *Id.* at 1081.

128. 487 P.2d 499 (Nev. 1971).

129. *Id.* at 500.

130. *Id.* at 499.

calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards. The responsibility for the ultimate enforcement of those standards reposes in the courts since the government of the legal profession is a judicial function. Among other matters, these standards of propriety and honor require the lawyer to protect the rights of litigants in pending cases and to uphold the respect due courts of justice. Aside from this, simple regard for efficient and economical operation of our judicial system demands that all counsel refrain from needlessly creating possible impediments to obtaining a fair trial, with resulting litigation that delays rather than furthers the purpose of our courts.¹³¹

The *In re Raggio* court also noted that, “[t]he freedom to express oneself does not carry implications that nullify the guarantees of impartial trials. The processing of a case by those charged with the responsibility is not to be diverted from established protections and placed in the primitive melee of passion and prejudice.”¹³²

Although the judicial system has some means available to enforce compliance with court orders, those measures are not contemplated for use on a widespread scale. The primary means are deference and respect for the decisions rendered within the system. Decisions made within the judicial system are meaningless if no one feels compelled to follow them out of respect for the decision-making power of the courts. Thus, in order for the system to function properly, “justice must satisfy the appearance of justice.”¹³³

The Rules of Professional Conduct are drafted in part to protect the judicial system and the public’s confidence therein, but will not be interpreted to silence all lawyer criticism of the judicial system. The Indiana Supreme Court has determined that, in order to be reasonable in light of all of the circumstances, an attorney must present evidence that he can show is true, or that he conducted a credible inquiry prior to speaking. The Rules of Professional Conduct do not stand for the proposition that an attorney may be sanctioned for any statement criticizing the courts. In reaching this decision, the Indiana Supreme Court has determined that several factors must be taken into consideration, including what the attorney knew at the time he spoke, whether the attorney had a basis upon which to make statements concerning the court or the judge, whether those statements challenge the qualifications or integrity of the judge and the court, and whether the statement was reckless in light of the attorney’s knowledge and experience. An attorney risks violating the rules only when statements are false or are made with reckless disregard for their truth or falsity and such statements may have a tendency to lessen the public’s confidence in the integrity of the courts. Attorneys can, and should, point out deficiencies in the system, so long as those statements do not constitute unsupported attacks on the dignity and integrity of the courts.

Case law suggests that an attorney does not have the same rights of free speech as a lay person. In some situations, attorneys are held to a higher standard in order to protect the judicial system. There is no question that events that sometimes occur in a courtroom are worthy of criticism in the proper forum. However, such events do not serve as an

131. *Id.* at 499-500.

132. *Id.* at 500.

133. *Offut v. United States*, 348 U.S. 11, 13 (1954).

absolute defense to a charge of false or reckless criticism. Such is the state of the law, both in Indiana and other jurisdictions. Whether that law will be re-examined at some point in the future is an open question. Until it is, all members of the Bar must work within the confines set out by the cases discussed herein and elsewhere.

The judicial system is not without flaws, and open debate about these flaws should be readily encouraged. However, the Indiana Supreme Court, like many high courts, has determined that there is no place in the system for false or reckless allegations that undermine the integrity of the courts.

CONCLUSION

This body of law continues to develop and change. During 1994, courtroom practice changed with the advent of new evidence rules. The management of law office support staff members changed with the advent of new guidelines for legal assistants and clearer responsibility on the part of the supervising lawyer. Ethical scrutiny of legal fee arrangements was heightened while the scope of matters suitable for charging a contingent fee basis was broadened. Finally, the Indiana Supreme Court examined the constraints on lawyer speech that criticizes members of the judiciary.

In the near future, many of the topics covered herein will, almost certainly, ripen into issues needing further attention by the court. One common theme present in all of these developments is the obvious need for lawyers to heighten their attention to ethical traps and pitfalls. The stream of information on ethical and disciplinary problems is greater than it has been before. The changes discussed herein are, *en masse*, quite remarkable in their long term impact on the practice of law. Simple prudence dictates that an integral part of the lawyer's practice must include some regular scholarship and reflection on issues in professional responsibility.¹³⁴

134. Opinions expressed herein are solely those of the authors and, unless specifically attributed, should not be interpreted as those of the Indiana Supreme Court, the Indiana Supreme Court Disciplinary Commission nor the Office of the Attorney General.

APPENDIX A

RULES OF PROFESSIONAL CONDUCT

Rule 7.4. Communication of Specialty Practice.—When the communication otherwise meets the requirements of Rule 7.1, 7.2 and 7.3, a lawyer may:

- (a) Communicate the fact that the lawyer does or does not practice in particular fields of law, but may not express or imply any particular expertise except as other provided in Rule 7.4(b);
- (b) Communication that the lawyer is certified as a specialist in a field of practice when the certification and communication are authorized under Admission and Discipline Rule 30;
- (c) Until January 1, 1998, communicate or state that the lawyer is certified by the National Board of Trial Advocacy so long as the following appears immediately thereafter: "The National Board of Trial Advocacy is a private organization not affiliated with or sanctioned by the State or Federal government." [As amended November 27, 1990, effective January 1, 1991; amended December 5, 1994 effective February 1, 1995.]

APPENDIX B

ADMISSION AND DISCIPLINE RULE 30

INDIANA CERTIFICATION REVIEW PLAN

Section 1. Purpose.

The purpose of this rule is to regulate the certification of lawyers as specialists by independent certifying organizations ("ICO's[]) to:

- (a) Enhance public access to and promote efficient and economic delivery of appropriate legal services;
- (b) Assure that lawyers claiming special competence in a field of law have satisfied uniform criteria appropriate to the field;
- (c) Facilitate the education, training and certification of lawyers in limited fields of law;
- (d) Facilitate lawyer access to certifying organizations;
- (e) Expedite consultation and referral; and
- (f) Encourage lawyer self-regulation and organizational diversity in defining and implementing certification of lawyers in limited fields of law.

Section 2. Power of Indiana Commission for Continuing Legal Education (CLE).

CLE shall review, approve and monitor organizations (ICO's) which issue certifications of specialization to lawyers practicing in the State of Indiana to assure that such organizations satisfy the standards for qualification set forth in this rule.

Section 3. Authority of CLE.

In furtherance of the foregoing powers and subject to the supervision of and, where appropriate, appeal to the Supreme Court of Indiana, CLE shall have authority to:

- (a) Approve or conditionally approve appropriate organizations as qualified to certify lawyers as specialists in a particular field or closely related group of fields of law;
- (b) Adopt rules and policies reasonably needed to implement this rule and which are not inconsistent with its purpose;
- (c) Review and evaluate the programs of ICO's to assure continuing compliance with the purposes of this rule, the rules and policies of CLE, and the qualification standards set forth in Section 4;
- (d) Deny, suspend or revoke the approval of an ICO upon CLE's determination that the ICO has failed to comply with the qualification standards or rules and policies of CLE;
- (e) Keep appropriate records of those lawyers certified by ICO's approved under this rule;
- (f) Cooperate with other organizations, boards and agencies engaged in the field of lawyer certification;
- (g) Enlist the assistance of advisory committees to advise CLE; and
- (h) Make recommendations to the Indiana Supreme Court concerning:
 - (1) The need for and appointment of a Director and other staff, their remuneration and termination;

- (2) An annual budget;
- (3) Appropriate fees for applicant organizations, qualified organizations and certified specialists; and
- (4) Any other matter the Indiana Supreme Court requests.

Section 4. Qualification standards for independent certifying agencies.

(a) The ICO shall encompass a comprehensive field or closely related group of fields of law so delineated and identified (1) that the field of certification furthers the purpose of the rule; and (2) that lawyers can, through intensive training, education and work concentration, attain extraordinary competence and efficiency in the delivery of legal services within the field or group.

(b) The ICO shall be a non-profit entity whose objectives and programs foster the purpose of this rule and which is governed by lawyers who, in the judgment of CLE, are experts in the field of certification.

(c) The ICO shall have a substantial continuing existence and demonstrable administrative capacity to perform the tasks assigned it by this rule and the rules and policies of CLE.

(d) The ICO shall adopt, publish and enforce open membership and certification standards and procedures which do not unfairly discriminate against members of the Bar of Indiana individually or collectively.

(e) The ICO shall provide the following assurance to the continuing satisfaction of CLE with respect to its certified members:

- (1) That members have extraordinary competence and efficiency in the field of certification that is
 - (i) Comprehensive;
 - (ii) Objectively demonstrated;
 - (iii) Peer recognized; and
 - (iv) Reevaluated at appropriate intervals;

- (2) That members actively and effectively pursue the field of certification as demonstrated by continuing education and substantial involvement; and

(f) The ICO shall cooperate at all times with CLE and perform such tasks and duties as CLE may require to implement, enforce and assure compliance with and effective administration of this rule.

Section 5. Qualification standards for certification.

(a) To be recognized as certified in a field of law in the State of Indiana, the lawyer must be duly admitted to the bar of this state, in active status, and in good standing, throughout the period for which the certification is granted.

(b) The lawyer must be certified by an ICO approved by CLE, and must be in full compliance with the Indiana Bar Certification Review Plan, the rules and policies of the ICO and the rules and policies of CLE.

Section 6. Privileges conferred and limitations imposed.

(a) A lawyer who is certified under this rule may communicate the fact that the lawyer is certified by the ICO as a specialist in the area of law involved. The lawyer shall not represent, either expressly or impliedly, that the lawyer's certification has been individually recognized by the Indiana Supreme Court or CLE, or by an entity other than the ICO.

- (b) Certification in one or more fields of law, shall not limit a lawyer's right to practice in other fields of law.
- (c) Absence of certification in a field of law shall not limit the right of a lawyer to practice in that field or law. Participation in the Indiana Bar Certification Review Plan shall be on a voluntary basis.
- (d) The number of certifications which a lawyer may hold shall be limited only by the practical limits of the qualification standards imposed by this rule and the rules and policies of the ICO.
- (e) An ICO shall not be precluded from issuing certificates in more than one area of certification but in such event, the ICO's qualifications shall be judged and determined separately as to each such area of certification. To the extent consistent with the purpose of the Indiana Bar Certification Review Plan, any number of ICO's may be approved to issue certifications in the same or overlapping fields or groups of closely related fields of law.

Section 7. Fees.

To defray expenses of the Indiana Bar Certification Review program, the Indiana Supreme Court may establish and collect reasonable and periodic fees from the ICO's and from applicants and lawyers certified under the Indiana Bar Certification Review program.

Section 8. Appeal.

CLE action or inaction may be appealed as abuse of authority under the Rules of Procedure applicable to original actions in the Indiana Supreme Court. [Adopted December 5, 1994, effective February 1, 1995.]

1994 DEVELOPMENTS IN PROPERTY LAW

WALTER W. KRIEGER*

I. ADVERSE POSSESSION

In *Rieddle v. Buckner*,¹ the Rieddles sought to quiet title to a lot they had purchased by general warranty deed from the Weyhriches in 1989. Their neighbors, the Buckners, counterclaimed, asserting title by adverse possession to approximately 268 square feet of the Rieddles' property lying within their fence line. In addition to the quiet title action, the Rieddles also sought damages against the Weyhriches for breach of warranty of title. The trial court found for the Buckners on their counterclaim, quieted title to the portion of the lot outside the fence line in the Rieddles, and determined that the Rieddles had suffered \$500 in damages as the result of the loss of the land acquired by the Buckners.² The Rieddles appealed the award of title to the Buckners based on adverse possession and the court's denial of attorneys' fees and consequential damages in their action against the Weyhriches for breach of warranty of title.³

On the adverse possession issue, the Indiana Court of Appeals observed that in order to acquire title by adverse possession, "the claimant must prove actual, visible, notorious, and exclusive possession of the real estate, under a claim of ownership hostile to the true owner for a continuous ten-year period."⁴ While Indiana Code section 32-1-20-1 imposes an additional requirement that the adverse claimant must have paid all taxes and assessments on the real estate during the period of adverse possession,⁵ the court noted that the tax-paying requirement of the statute does not apply where a boundary dispute exists over the erection of a fence or other structure.⁶

The court rejected the Rieddles' contention that the Buckners' possession was not exclusive because a utility easement was located upon the disputed area.⁷ While recognizing that where the claimant occupies the land in common with a third person or

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1. 629 N.E.2d 860 (Ind. Ct. App. 1994).

2. *Id.* at 862.

3. *Id.* at 862-63.

4. *Id.* at 862 (citing *Snowball Corp. v. Pope*, 580 N.E.2d 733, 734 (Ind. Ct. App. 1991)).

5. IND. CODE § 32-1-20-1 (1993).

6. *Rieddle*, 629 N.E.2d at 862. The Indiana Supreme Court, in *Echterling v. Kalvaitis*, 126 N.E.2d 573, 575 (1955), held that the additional statutory requirement that the claimant pay all taxes and assessments on the disputed land during the adverse possession period did not apply in boundary disputes involving the erection of a fence or other structures. In a concurring opinion in *Rieddle*, Judge Sullivan conceded that until overruled, the Indiana Court of Appeals was bound by the *Echterling* decision. *Rieddle*, 629 N.E.2d at 866. However, Judge Sullivan agreed with the dissenting opinion by Judge Hoffman in *Kline v. Kramer*, 386 N.E.2d 982, 990 (Ind. Ct. App. 1979) that the supreme court had ignored the clear and unambiguous language of IND. CODE § 32-1-20-1, and had rewritten the statute to exclude the tax-paying requirement in boundary disputes. *Rieddle*, 629 N.E.2d at 865. Where the language of the statute is clear and unambiguous, it "must be given its apparent or obvious meaning," and the court is not free to read into it some perceived legislative purpose. *Id.* (citations omitted).

7. *Rieddle*, 629 N.E.2d at 862.

the general public the possession is not exclusive, the court observed that in *Snowball Corp. v. Pope*,⁸ the presence of licensees on the land did not prevent exclusive possession by the claimant. Similarly, the existence of an easement would not negate exclusivity. The utility companies used the land only for a limited purpose and did not claim ownership.⁹

The Rieddles also argued that the Buckners had failed to show that their possession was hostile and notorious. To be notorious, the possession must be “so conspicuous that it is generally known and talked of by the public in the vicinity.”¹⁰ To be hostile, the possession by the claimant must “not disavow his right to possess the property or acknowledge that it is subservient to the title of the true owner.”¹¹ Both elements are designed to alert the true owner that someone is making a claim to the property. The court could not understand how the presence of the fence and the landscaping would fail to alert the Rieddles that a claim was being made to the disputed area.¹²

Although the court did not elaborate on the nature of the Buckners’ activities within the disputed area, the court did comment that their “actions exhibit an exclusive possession of the property within their fence,” which had been erected by the Buckners in 1977.¹³ This observation would indicate that the ten-year period for acquiring title to the disputed area by adverse possession had been reached prior to the Rieddles’ acquiring of record title to the lot from the Weyhriches in 1989.

On the issue of damages for breach of warranty of title, the Rieddles claimed that they were entitled to consequential damages resulting from their inability to refinance their mortgage at a lower interest rate because of the lack of a clear title. The court observed, however, that damages for breach of contract are limited to those damages reasonably foreseeable at the time the contract is made, and damages relating to refinancing were not foreseeable.¹⁴

Next, the Rieddles contended that because the Weyhriches had refused to defend their title against the Buckners’ adverse possession claim, they were entitled to reimbursement for litigation expenses, including attorneys’ fees.¹⁵ The court noted that a warranty deed guarantees that the property is free from all encumbrances and that the covenantor will defend the title against all lawful claims.¹⁶ Here, the Weyhriches had refused to defend

8. 580 N.E.2d at 736.

9. *Rieddle*, 629 N.E.2d at 862-63.

10. *Id.* at 863 (citing *Snowball Corp.*, 580 N.E.2d at 735).

11. *Id.* (citing *Kline v. Kramer*, 386 N.E.2d 982, 988 (Ind. Ct. App. 1979)).

12. *Id.* The Rieddles contended that since the subdivision covenants allowed fences to be erected on the lots, the maintenance of a fence was neither notorious nor hostile. In rejecting this contention, the court noted that the covenants did not authorize the erection of a fence on someone else’s property. *Id.*

13. *Id.* at 862-63.

14. *Id.* at 864.

15. *Id.* The Rieddles relied upon an Illinois decision, *Rauscher v. Albert*, 495 N.E.2d 149, 154 (Ill. App. Ct. 1986), which awarded attorneys’ fees and expenses in defending title against an adverse possession claim, but not the expenses and attorneys’ fees arising from the plaintiff’s action for breach of covenants in the deed. *Rieddle*, 629 N.E.2d at 864.

16. *Rieddle*, 629 N.E.2d at 864 (citing *McClaskey v. Bumb & Mueller Farms, Inc.*, 547 N.E.2d 302, 304 (Ind. Ct. App. 1989), *trans. denied; appeal after remand rev’d sub nom. Hudson v. McClaskey*, 583 N.E.2d

the Rieddles' title against the adverse possession claim of the Buckners, and as a result, the Rieddles were entitled to reimbursement for attorneys' fees and other litigation expenses.¹⁷ The court concluded, however, that the trial court had not abused its discretion in denying the Rieddles attorneys' fees of \$16,225 and additional legal and litigation expenses of \$900, where the land in dispute was worth only \$500.¹⁸ The court remanded the case and directed the trial court to award the Rieddles reasonable attorneys' fees.¹⁹

II. BROKER: WHEN COMMISSION EARNED

Under Indiana law, "a broker earns its commission when it causes a sale or procures a buyer ready, willing, and able to purchase the property."²⁰ However, the broker and the seller are free to enter into a listing agreement that provides different terms or conditions as to when a commission is earned.²¹

In *Bishop v. Sanders*,²² the sellers, the Sanders, signed a four-month exclusive listing contract on May 3, 1991, with Donn Bishop, d/b/a Century 21 Donn Bishop Real Estate ("Century 21"). The listing contract provided that:

OWNER agrees to pay principal broker a fee of seven percent . . . upon the occurrence of any of the following events: . . . 4. At the time OWNER sells the Property to a Purchaser procured in whole or in part by the efforts of the principal broker, a cooperating Broker or the OWNER during the term of the Contract . . .²³

In addition, the listing contract contained an exclusion clause that stated: "This listing contract excludes Ruth Kennedy for [a] two week period starting today's date."²⁴ The two-week period ended May 17, 1991. Ruth Kennedy made an offer to purchase the house on June 21, 1991 and the sale was completed on August 19, 1991. The listing contract did not expire until September 3, 1991. Century 21 brought suit to recover a commission on the sale. The trial court entered judgment in favor of the Sanders, finding

1228 (Ind. Ct. App. 1992), *aff'd in part, rev'd in part*, 597 N.E.2d 308 (Ind. 1992); IND. CODE § 32-1-2-12 (1993)).

17. *Id.* The court relied upon *Worley v. Hineman*, 33 N.E. 260 (Ind. App. 1893) as "[t]he sole Indiana case discussing the recovery of costs and expenses in defending title." *Rieddle*, 629 N.E.2d at 864. However, a second Indiana Court of Appeals opinion, *Teague v. Whaley*, 50 N.E. 41, 42 (Ind. App. 1897), apparently overlooked by the court, indicates that where the grantee gives proper notice of the suit to the covenantor and requests him to defend the title, if the grantor refuses to do so, the grantee may defend his title and recover from the grantor damages for injury to the land and costs of defending the suit, including attorneys' fees.

18. *Rieddle*, 629 N.E.2d at 864-65.

19. *Id.* at 865.

20. *Bishop v. Sanders*, 624 N.E.2d 64, 66 (Ind. Ct. App. 1993) (citing *Fischer v. Bell*, 91 Ind. 243, 244-45 (1883)). *See also Wilson v. Upchurch*, 425 N.E.2d 236, 238 (Ind. Ct. App. 1981).

21. *Sanders*, 624 N.E.2d at 66 (citing *Lane v. Albright*, 49 Ind. 275, 279 (1874)).

22. *Id.* at 65.

23. *Id.*

24. *Id.* at 66.

that Century 21 failed to prove it had procured the buyer or that the defendant had procured the buyer after May 17, 1991, and Century 21 appealed.²⁵

The Indiana Court of Appeals observed that under the terms of the listing contract, except for the exclusion clause, the Sanders had agreed to pay a commission to Century 21 if the house was sold during the period of the listing contract with or without the efforts of Century 21.²⁶ Thus, it was critical to ascertain the effect of the language contained in the exclusion clause.²⁷

The court determined that the language was susceptible to more than one interpretation,²⁸ and that when interpreting an ambiguous provision it "must treat the contract as a whole so as to harmonize all words and phrases therein to best give effect to the parties' intentions at the time they entered the contract."²⁹ Looking at the entire agreement the court concluded that the purpose of the provision was to exempt the Sanders from paying a commission to Century 21 should a sale to Kennedy result from certain activities within the two-week period.³⁰ The question then became: "[W]hat conduct, at what time, qualifies for the exclusion provision[?]"³¹

The Sanders argued that since they had found Kennedy as a potential buyer within the two-week period, no commission was due on the later sale to her. In rejecting this contention, the court noted that to hold a mere introduction to a potential buyer is sufficient to "procure" that buyer would render the exclusion clause "useless," because the Sanders were aware that Kennedy was a potential buyer at the time the listing contract was signed.³² Instead, the court interpreted the exclusion clause to exempt Sanders from the payment of the commission upon the sale to Kennedy during the period of the listing contract only if Kennedy was ready, willing, and able to purchase the house before May 17, 1991.³³ The evidence established that Kennedy was not in such a position. Kennedy testified that she did not believe she could afford the house before she made the offer to purchase on June 21, 1991. Thus, the exclusion clause did not apply and Century 21 was entitled to its commission, court costs, and attorneys' fees.³⁴ The court reversed the trial court's judgment and remanded for an assessment of attorneys' fees and costs.³⁵

25. *Id.*

26. *Id.* The court noted that the record was unclear as to whether Century 21 had assisted in the sale of the house to Kennedy. *Id.*

27. *Id.*

28. *Id.* at 67. The parties presented three possible interpretations: (1) Kennedy was prohibited from purchasing or otherwise negotiating with the Sanders for a two-week period; (2) the Sanders were free to negotiate with Kennedy for a two-week period and any fruits of the negotiations would be exempt from the provisions of the listing contract; or (3) the Sanders could escape the provisions of the listing contract only if they completed the sale to Kennedy within the two-week period. *Id.*

29. *Id.* (citing *DeHaan v. DeHaan*, 572 N.E.2d 1315, 1320 (Ind. Ct. App. 1991)).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 68.

35. *Id.*

III. CONCURRENT OWNERSHIP: MULTIPLE PARTY ACCOUNTS

During the past few years, several opinions from the Indiana Court of Appeals have held that the right of survivorship in funds placed in a multiple-party account cannot be terminated without the consent of all of the parties to the account. In *Voss v. Lynd*,³⁶ the Indiana Court of Appeals held that a husband could not destroy the wife's right of survivorship in certificates of deposits (CDs) in the names of both parties by removing the wife's name from the CDs without her consent. In *Shourek v. Stirling*,³⁷ the estate of the deceased co-tenant, Jonas, who had deposited all the funds into the accounts, sought to recover the funds that had been removed from the accounts prior to Jonas's death by the surviving co-tenant, Stirling. In awarding the funds that had been removed from the accounts to the surviving co-tenant, the Indiana Court of Appeals held that the removal of the funds by one co-tenant without the consent of the other did not destroy the right of survivorship in the funds that had been removed.³⁸

The Indiana Supreme Court granted transfer in *Shourek* and vacated the opinion of the court of appeals, noting that under the multiple-party account statute, only sums remaining on deposit at death presumptively belong to the survivor.³⁹ Since all the funds had been removed prior to death, there were no funds upon which the statutory presumption could operate.⁴⁰ The funds removed from the accounts during Jonas's lifetime apparently belonged to her estate at her death because Jonas had contributed all the funds in the accounts, and, under the provisions of the multiple-party bank account statute, "[a] joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent."⁴¹ The court remanded the case to determine if Jonas had intended to create a present interest in the funds in Stirling prior to her death by making an *inter vivos* gift.⁴²

The Indiana Supreme Court in *Shourek* did not comment on the *Voss* decision.⁴³ In *Voss*, the husband merely removed his wife's name from the CDs. However, in dictum, the opinion suggests that the husband could not have destroyed the right of survivorship even by cashing in the CDs:

A joint account can be terminated only by mutual agreement of the joint tenants. Moreover, one joint tenant of money in a joint bank account cannot divest the other of his joint ownership by withdrawing the money without the other's

36. 583 N.E.2d 1239, 1242 (Ind. Ct. App. 1992). For a discussion of the *Voss* decision, see Walter W. Krieger, *1992 Developments in Indiana Property Law*, 26 IND. L. REV. 1113, 1113-16 (1993).

37. 607 N.E.2d 402, 403-04 (Ind. Ct. App. 1993), *vacated* 621 N.E.2d 1107 (Ind. 1993).

38. *Id.* at 405. For a discussion of the *Shourek* opinion, see Walter W. Krieger, *1993 Developments in Indiana Property Law*, 27 IND. L. REV. 1285, 1285-87 (1994).

39. 621 N.E.2d at 1109 (citing IND. CODE § 32-4-1.5-4(a) (1993)).

40. *Id.* at 1110.

41. IND. CODE § 32-4-1.5-3(a) (1993).

42. *Shourek*, 621 N.E.2d at 1110.

43. See *supra* note 36 and accompanying text.

knowledge and consent [The wife's] estate would still have acquired the CDs by right of survivorship.⁴⁴

This dictum clearly conflicts with the supreme court's holding in *Shourek*.

An additional factor to be considered with regard to the termination of a multiple-party account was raised in *Graves v. Kelley*.⁴⁵ In *Graves*, the mother, McGinness, used her individual funds to open a joint account with right of survivorship with her son, Graves, in 1986. On March 17, 1992, McGinness telephoned the financial institution, Shearson, Lehman Brothers, Inc. ("Shearson") and instructed them to liquidate the account. The account was liquidated that afternoon, and McGinness died the next morning, March 18, 1992. On the afternoon of March 18, 1992, Shearson issued a check for \$17,453.60 made payable to "Marie McGinness and Chester Graves, JTROS."⁴⁶ The next day the check arrived at McGinness's address. In an action by the personal representative of McGinness's estate to determine the ownership of the funds, the trial court awarded the account proceeds to McGinness's estate, and Graves appealed.⁴⁷

The estate argued, under the same rationale put forth in *Jonas v. Stirling*, that since the account was empty at the time of McGinness's death, Graves had no right of survivorship with regard to the funds withdrawn by McGinness before her death.⁴⁸ The Indiana Court of Appeals observed, however, that although the joint account deposit agreement, signed by both McGinness and Graves, stated that each joint tenant had the right to receive and withdraw funds "as fully as if he alone were interested in said account," the agreement also provided that: "Notwithstanding the foregoing, you [Shearson] are authorized, in your discretion, to require joint action by the joint tenants with respect to any matter concerning the joint account, including . . . the withdrawal of moneys, securities, or commodities."⁴⁹ In this case, Shearson chose not to pay the funds to McGinness individually but to issue the check to both co-tenants with right of survivorship. Thus, the proceeds from the account were still held in joint tenancy with the right of survivorship at the time of McGinness's death. The judgment was reversed and the case remanded for proceedings consistent with the decision.⁵⁰

The *Graves* decision points out the critical importance of the wording of the contractual agreement creating the multiple-party account. Under the contract with Shearson, joint action by the joint tenants could be required "with respect to any matter concerning the account, including . . . the withdrawal of [funds]."⁵¹ Thus, while the multiple-party bank account statute itself does not require the consent of both parties to withdraw funds from the account without the consent of the other co-tenants, the contract creating the account could add such a requirement.

44. *Voss v. Lynd*, 583 N.E.2d 1239, 1242 (Ind. Ct. App. 1992) (citations omitted).

45. 625 N.E.2d 493 (Ind. Ct. App. 1993).

46. *Id.* at 494.

47. *Id.*

48. *Id.* at 495.

49. *Id.* (emphasis omitted).

50. *Id.*

51. *Id.*

Unfortunately, the court in *Graves* continued to repeat the dictum in *Voss*: "A joint account can be terminated only by mutual agreement of the joint tenants."⁵² The court then stated that *Graves* did not agree to the termination of the joint account.⁵³ To the extent the language in *Graves* suggests that the multiple-party bank account statute itself requires the consent of all the parties to a joint account to terminate the right of survivorship to funds removed from the account by one of the parties, the decision appears to conflict with the supreme court's holding in *Shourek*.

IV. LANDLORD AND TENANT

A. *Constructive Eviction: Damages Recoverable by Tenant*

A constructive eviction occurs when an act or omission by the landlord materially deprives the tenant of the use or enjoyment of the leased premises.⁵⁴ Where a tenant has been constructively evicted by the landlord, the duty to pay rent is suspended and the tenant may treat the lease as terminated.⁵⁵ In addition, the tenant may also recover damages for the wrongful eviction. The standard measure of damages is the difference between the reserved rent and the fair rental value of the premises for the balance of the lease term. However, the tenant may be allowed to prove special damages such as loss of expected business profits for the remainder of the lease term.⁵⁶ The question of whether lost profits for the remainder of the lease term can be recovered by a commercial tenant who was constructively evicted by the landlord was raised in *Williams v. Hittle*.⁵⁷

In *Williams*, the lessees, Hittle and Brown, vacated the leased premises following several ineffective attempts by the landlord, Williams, to repair a roof which had been severely damaged in a storm.⁵⁸ The lessees brought an action for damages resulting from the landlord's constructive eviction from the premises and Williams counterclaimed for nonpayment of rent. The jury awarded the lessees \$30,000 in damages and Williams appealed.⁵⁹

On appeal, the Indiana Court of Appeals determined that there was sufficient evidence that Williams had breached his duty under the lease to repair the roof, and that the failure to repair the roof deprived the lessees of the beneficial use and enjoyment of the premises, which amounted to a constructive eviction.⁶⁰ Williams argued that even if he had breached his duty to repair the roof, the only relief available to the lessees was the

52. *Id.* at 494 (citing *Voss v. Lynd*, 583 N.E.2d 1239, 1239 (Ind. Ct. App. 1992)).

53. *Id.*

54. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 6.33, at 286-87 (2d ed. 1993).

55. *Id.* at 287; ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT §3:8, at 105 (1980).

56. SCHOSHINSKI, *supra* note 55, § 3:8, at 107.

57. 629 N.E.2d 944 (Ind. Ct. App. 1994).

58. *Id.* at 945. As a result of the leaking roof, the lessees' hair care business began to decline, and, after portions of the ceiling fell onto two customers, the lessees closed the salon. *Id.* at 946.

59. *Id.* at 945.

60. *Id.* at 950. The court noted the term "constructive eviction" means "an act or omission by the lessor [that] materially deprives the lessee of the beneficial use or enjoyment of the leased property." *Id.* (quoting *Sigbee v. Swathwood*, 419 N.E.2d 789, 794 (Ind. Ct. App. 1981)).

suspension of the obligation to pay rent. The court disagreed, noting that in the case of a constructive eviction, “[a]s in other contract actions, upon a finding of injury suffered as a consequence of breach of a duty to repair, a party may recover consequential damages.”⁶¹ Furthermore, “lost profits may be used as a measure of damages where such are appropriate and ascertainable with a reasonable degree of certainty.”⁶² Here, the lessees had operated an established business and had introduced into evidence financial records showing that the partnership had realized a net profit of \$11,561.65 in 1987, and that the net profits had increased to \$31,296.15 in 1988. From this, the court concluded, the jury could have reasonably determined that the tenants “suffered a business loss in 1989 (the remainder of the lease period) roughly equivalent to the amount of net profit realized in 1988.”⁶³ Therefore, the court affirmed the judgment.

B. Covenant to Maintain Leased Premises: Public Policy

In *Fresh Cut, Inc. v. Fazli*,⁶⁴ the Indiana Court of Appeals addressed the question of whether it is against public policy to allow a landlord to contractually shift the duty to maintain a sprinkler system in an operable condition on the leased premises to the tenant where a municipal ordinance places that responsibility on the owner of the building. In *Fresh Cut*, the tenant, Fresh Cut, Inc. (“Fresh Cut”), and State Farm Fire & Casualty Co. sued the landlord, Fazli, for damages sustained in a fire on the leased premises. They alleged that Fazli had been notified by the Indianapolis Fire Department that the sprinkler system was inoperative and that his refusal to maintain the sprinkler system in an operable condition was reckless and willful conduct entitling them to punitive damages.⁶⁵ Fazli counterclaimed, alleging that Fresh Cut had breached its contractual obligation to maintain the building’s sprinkler system. The trial court denied Fresh Cut’s motion for summary judgment on Fazli’s counterclaim and Fresh Cut appealed.⁶⁶

61. *Id.* at 951.

62. *Id.* (citing *Wolff v. Slusher*, 314 N.E.2d 758, 763 (Ind. Ct. App. 1974)).

63. *Id.* The decision contains a detailed discussion of the admissibility of financial statements under the business record exception to the hearsay rule. Although the statements were prepared by an accountant who was not an employee of the lessees, because the statements were used by the lessees in the preparation of their taxes, the court concluded that they were business records pertaining to regularly conducted business and admissible under the business record exception to the hearsay rule. *Id.* at 946-49.

64. 630 N.E.2d 575 (Ind. Ct. App. 1994). After the Survey period had ended, the Indiana Supreme Court granted transfer on this case. See 1995 LEXIS 73. The supreme court adopted the analysis used by the court of appeals. It found that the owner of commercial property can shift to the tenant by written agreement a responsibility imposed upon the owner by a municipal ordinance to maintain a fire protection sprinkler system. However, the supreme court did not agree with the court of appeals’ conclusion that in this case the written lease agreement had unambiguously placed the responsibility for maintaining the sprinkler system on the tenant. The supreme court concluded that the trial court was correct in denying summary judgment for the tenant on the owner’s counterclaim for breach of contract. A lease provision shifting the duty to maintain the sprinkler system to the tenant would not be against public policy, but the court remanded the case to the trial court to determine whether in this case the owner or the tenant was responsible for maintaining the sprinkler system under the lease.

65. *Fresh Cut*, 630 N.E.2d at 575 n.1.

66. *Id.* at 577.

Fresh Cut argued that the duty to maintain the sprinkler system imposed by a municipal ordinance was non-delegable and could not be shifted by contract. The Indiana Court of Appeals disagreed, finding that “it is in the best interest of the public that persons should not be unnecessarily restricted in their freedom of contract. . . . [T]he parties to a contract are free to include in the agreement any provisions they desire so long as such provisions do not offend the public policy of this state.”⁶⁷ Furthermore, the court noted:

In Indiana, the parties may agree to cover the risk of harm which may be sustained by third persons by agreeing through an indemnity clause to shift the financial burden from the indemnitee to the indemnitor. . . . An indemnification clause in a lease is not void or voidable as against public policy simply because the indemnitee is charged with a nondelegable duty to the public or third persons.⁶⁸

The court observed, however, that such private agreements have been found to be unenforceable “when it is determined that they contravene statutory law, are clearly contrary to what the legislature has declared to be public policy or clearly tend to injure the public in some sort of way.”⁶⁹ Here, the court found that neither the Indiana Fire Prevention Code as adopted by the Indiana Fire Prevention and Building Safety Commission nor the ordinance at issue, which incorporated Chapter 13 of the National Fire Prevention Association Standards (NFPA), “explicitly prohibits” the lessor from requiring the lessee to perform the duties imposed by the ordinance.⁷⁰ However, since Chapter 13 of NFPA placed the responsibility for the maintenance of the sprinkler system on the owner of the building, a question was raised as to whether shifting the responsibility to the tenant contravened the legislative intent or adversely affected the public welfare.⁷¹ In resolving this question, the court used a balancing test where it evaluated

the nature of the subject matter of the contract, the strength of the public policy underlying the statute, the likelihood that refusal to enforce the bargain or term will further that policy and how serious or deserved would be the forfeiture suffered by the party attempting to enforce the bargain. . . . We must also weigh in the balance the parties’ freedom to contract.⁷²

The court found that the purpose of the ordinance was to protect the public and commercial lessees from the dangers associated with fire.⁷³ However, since a commercial lessee is able to protect itself in the transaction, there is no unequal bargaining position “as might have existed with residential lessees.”⁷⁴ Moreover, the public welfare is not

67. *Id.* (citations omitted).

68. *Id.* at 578.

69. *Id.*

70. *Id.* at 579.

71. *Id.*

72. *Id.* (citations omitted).

73. *Id.*

74. *Id.* This language strongly suggests that a landlord would not be permitted to shift the duty to maintain residential units in a safe and habitable condition under the implied warranty of habitability

adversely affected by the clause because "third persons still have recourse to Fazli in tort for their damages."⁷⁵ Thus, the trial court did not reach an erroneous conclusion as to the enforceability of the clause.⁷⁶

Fresh Cut argued in the alternative that the lease did not impose on it a contractual duty to maintain the sprinkler system. The court disagreed, finding that the wording of the lease "unambiguously place[d] responsibility for keeping all of the leased premises, including the sprinkler system, in proper operating condition upon Fresh Cut."⁷⁷ Therefore, Fresh Cut was not entitled to summary judgment on the landlord's counterclaim, and the trial court's judgment was affirmed.⁷⁸

C. Ejectment and Liability for Future Rent

Normally, when the landlord evicts the tenant prior to the end of the stated term in the lease, the tenant's obligation for future rent ends.⁷⁹ The landlord is not entitled to both possession and rent. However, in 1989, the Indiana Court of Appeals held that where the lease contains a "savings clause," the tenant remains liable for the rent for the balance of the lease term, even though the tenant has been evicted from the premises.⁸⁰

In the 1994 case of *Marshall v. Hatfield*,⁸¹ the landlords, the Marshalls, brought an action for ejectment against the tenant, Hatfield. At the possession hearing, the trial court ordered Hatfield to pay the Marshalls the rent then due and owing and to vacate the apartment at the end of the month.⁸² Hatfield complied with the court order in all respects. At a later damages hearing, the court awarded the Marshalls \$100.00 in damages and court costs, and ordered them to return the balance of the \$345.00 security deposit to Hatfield. The Marshalls appealed the trial court's order.⁸³

On appeal, the Marshalls argued that the lease contained a savings clause that made the tenant liable for the rent for the balance of the lease term. The Indiana Court of Appeals failed to uncover a savings clause in the lease, but the court determined that even if a savings clause had been included in the written lease, no future rent would be owed by the tenant.⁸⁴ The written lease was from April 11, 1992 to April 30, 1992, a term of

to a residential tenant. For further discussion of this issue, see SCHOSHINSKI, *supra* note 55, §§ 3:27, 3:33, at 144, 156.

75. *Fresh Cut*, 630 N.E.2d at 579.

76. *Id.* at 580.

77. *Id.* The lease provided that the Lessee was not to use the premises "in any manner constituting a violation of any ordinance, statute, regulations or order of any governmental authority," and was to "maintain in good condition and repair the leased premises, including but not limited to the electrical systems, heating and air conditioning systems." *Id.*

78. *Id.*

79. SCHOSHINSKI, *supra* note 55, § 5:34, at 334.

80. *Nylen v. Park Doral Apartments*, 535 N.E.2d 178, 182 (Ind. Ct. App. 1989), *trans. denied*, Aug. 31, 1989. The savings clause provided: "Eviction of tenant for a breach of lease agreement shall not release tenant from liability for rent payment for the balance of the term of the lease." *Id.* at 181.

81. 631 N.E.2d 490 (Ind. Ct. App. 1994).

82. *Id.*

83. *Id.*

84. *Id.* at 493.

nineteen days. When Hatfield held over after April 30, the lease only extended from month to month, and terminated when Hatfield paid rent for the month of June and vacated the premises at the end of the month in compliance with the order of the trial court.⁸⁵

The Marshalls further contended that the trial court was in error when it ordered them to return the balance of the security deposit to Hatfield. In response, the court observed that since the case was placed on the small claims docket, it was not necessary for Hatfield to file a counterclaim for this relief.⁸⁶ Even though the Marshalls had never been given the opportunity to voluntarily comply with the notice provisions of the Security Deposit Act,⁸⁷ they failed to demonstrate how they were harmed by the trial court's order to return the balance of the security deposit to Hatfield. The Marshalls conceded that no damages were due other than the July rent, utilities and advertising expenses totalling \$99.80. Thus, the issue was tried by the implied consent of the parties and Hatfield was entitled to a return of the balance of the security deposit.⁸⁸ Therefore, the judgment was affirmed.⁸⁹

D. Jurisdiction Limit of Small Claims Court

In Indiana, small claims courts have original and concurrent jurisdiction over landlord-tenant disputes.⁹⁰ The jurisdiction of the small claims docket of a circuit or superior court is limited in civil actions to claims "in which the amount sought or value of the property sought to be recovered is not more than three thousand dollars (\$3000)," but a party "may waive the excess of any claim that exceeds three thousand dollars (\$3000) in order to bring it within the jurisdiction of the small claims docket."⁹¹ In

85. *Id.*

86. *Id.* "The trial shall be informal, with the sole objective of dispensing speedy justice . . . and shall not be bound by statutory provisions or rules of practice, procedure, pleadings or evidence . . ." *Id.* (quoting IND. R. SMALL CLAIMS, Rule 8(A)).

87. Under the Security Deposit Act, the landlord has 45 days after termination of the rental agreement and delivery of possession to mail an itemized notice of damages to the tenant along with the balance of the security deposit held by the landlord. IND. CODE § 32-7-5-12(a) (1993).

88. *Marshall*, 631 N.E.2d at 494.

89. *Id.*

90. In most counties the circuit or superior court has a standard small claims division. The small claims docket of the circuit or superior court has jurisdiction over "[c]ivil actions in which the amount sought or value of the property sought to be recovered is not more than three thousand dollars (\$3000)," and "[p]ossessory actions between landlord and tenant in which the rent due at the time the action is filed does not exceed three thousand dollars (\$3000)." IND. CODE §§ 33-4-3-7(1)(2), 33-5-2-4(1)(2) (1993). Marion County has independent small claims courts with "original and concurrent jurisdiction with the circuit, superior, and municipal courts in all civil cases founded on contract or tort in which the debt or damage claimed does not exceed six thousand dollars (\$6000), not including interest or attorney fees." *Id.* § 33-11.6-4-2. The small claims court also has original and concurrent jurisdiction "in possessory actions between landlord and tenant in which the past due rent at the time of filing does not exceed six thousand dollars (\$6000)," excluding interest and attorney fees. *Id.* § 33-11.6-4-3.

91. *Id.* §§ 33-5-2-4(1), 33-4-3-7(1).

Meyers v. Langley,⁹² one issue raised was whether the amount of the award of damages to the landlord exceeded the jurisdictional limit of the small claims division. A second issue involved the sufficiency of the landlord's itemized list of damages mailed to the tenant as required by Indiana Code section 32-7-5-14.⁹³

In *Meyers*, the landlord, Langley, brought an action in the small claims division of the Howard Superior Court seeking accrued rent payments and damages against his former tenant, Meyers. Following a trial, the court found that the amount of damages owed to Langley, after giving credit for the \$300 security deposit, was \$3,305.74, and entered judgment for Langley in the amount of \$3000, the jurisdictional limit of the small claims division.⁹⁴ Meyers appealed the judgment of the court.⁹⁵

Meyers contended that Langley, by offering evidence of damages in excess of \$3000, exceeded the jurisdictional limit of the small claims division. Similarly, Meyers argued that the court, by finding Langley's damages were \$3,365.74, made an award in that amount, which exceeded its jurisdiction. The Indiana Court of Appeals rejected these arguments. Meyers had confused the amount of damages with the amount of relief sought.⁹⁶ Indiana statutory law expressly provides that a party in a small claims action "may waive the excess of any claim that exceeds three thousand dollars (\$3,000.00) in order to bring [the claim] within the jurisdiction of the small claim docket."⁹⁷ To hold that a party could not prove damages in excess of \$3000 would be to "completely negate the waiver portion of the statute."⁹⁸ Langley's complaint requested relief of no more than \$3000. The court concluded that a finding of damages is not the same as an award of damages, and the statute only limits the awarding of damages to no more than \$3000.⁹⁹

Meyers further asserted that by deducting the \$300 security deposit from the damages before awarding the landlord \$3000, the court had in effect awarded the landlord \$3300. Since the court must limit its award of damages to \$3000, the security deposit should have been subtracted from the \$3000 judgment. In support of his position, Meyers cited *Skiver v. Brighton Meadows*,¹⁰⁰ in which the Indiana Court of Appeals apparently approved of the trial court's judgment that awarded the landlord \$2650 after first deducting a \$350 security deposit, even though the proof of damages exceeded the \$3000 jurisdictional limit. The *Meyers* court, however, concluded that the *Skiver* court "merely restated the award made by the small claims court," and "then overturned the award on grounds

92. 638 N.E.2d 875 (Ind. Ct. App. 1994).

93. *Id.* at 878. Under this statute, the landlord may retain the tenant's security deposit and apply it towards accrued rent and damages to the rental unit. However, the landlord is required to mail an itemized list of damages for which he intends to use the security deposit within 45 days after the termination of the occupancy. IND. CODE § 32-7-5-14 (1993).

94. *Meyers*, 638 N.E.2d at 876-77.

95. *Id.* at 876.

96. *Id.* at 877.

97. *Id.* (quoting IND. CODE § 32-5-2-4(1) (1993)). The statute controlling the jurisdiction of the small claims docket of circuit courts, IND. CODE § 32-4-3-7(1) (1993), contains identical language regarding waiver of claims in excess of the jurisdictional limit.

98. *Meyers*, 638 N.E.2d at 877.

99. *Id.* at 878.

100. 585 N.E.2d 1345, 1346 (Ind. Ct. App. 1992).

having nothing to do with the jurisdictional amounts of [Indiana Code] 33-5-2-4.”¹⁰¹ Thus, it was not error for the trial court to apply the security deposit to the damages in excess of \$3000 before awarding the \$3000 judgement.¹⁰²

The second issue raised on appeal was whether the letter of notification of damages sent to Meyers by Langley complied with Indiana Code section 32-7-5-14.¹⁰³ Meyers vacated the premises the last week of April 1991, and on June 13, 1991, Langley mailed a letter to Meyers notifying her that she owed \$300 in rent for the months of May and June and indicating that Langley would seek an additional \$7,789.57 for repairs to the rental unit. A list of damages and an estimated cost of their repair was attached to the letter. Langley retained Meyers’ \$300 security deposit. According to section 32-7-5-14, when the landlord retains the tenant’s security deposit, the landlord is required to mail to the tenant within forty-five days after the termination of occupancy an “itemized list of damages” for which he intends to use the tenant’s security deposit, along with the “estimated cost of repair for each damaged item.”¹⁰⁴ Failure to comply with the statutory notice of damages “constitutes agreement by the landlord that no damages are due, and the landlord must remit to the tenant immediately the full security deposit.”¹⁰⁵ Meyers claimed that while the list of repairs attached to the letter included general estimates of the costs of repairs, it did not contain an “itemized list of damages.”¹⁰⁶ The court disagreed:

The letter sent by Langley itemized as damages material for two doors, material to fix the bathroom, material for a “kit” room, labor costs, and court costs and set forth specific dollar amounts attributable to each. The letter further provided that Langley was claiming \$600.00 for two months accrued rent. The purpose of the notice provision is to inform the tenant that the landlord is keeping the security deposit and for what reason. It provides the tenant an opportunity to challenge the costs for which the deposit is being used. That purpose has been served here.¹⁰⁷

Therefore, the judgment of the trial court was affirmed.¹⁰⁸

101. *Meyers*, 638 N.E.2d at 877 n.2. While it is true that in *Skiver* the judgment of the trial court was reversed on grounds unrelated to the amount of the damage award, the *Skiver* court restated the trial court’s award of damages without any suggestion that it disagreed with the amount of the judgment. *Skiver*, 585 N.E.2d at 1346.

102. *Meyers*, 638 N.E.2d at 877 n.1. The trial court found for the tenant on her counterclaim in the amount of \$308.56 “as reimbursement of actual expenses,” but did not consider the counterclaim in awarding the \$3000 judgment. *Id.* at 878 n.3. The court observed that there were two separate judgments: “Langley prevailed upon his claim in the amount of \$3,000.00, and Meyers prevailed upon her counterclaim in the amount of \$308.56.” *Id.*

103. IND. CODE § 32-7-5-14 (1993).

104. *Id.*

105. *Id.* § 32-7-5-15 (1993).

106. *Meyers*, 638 N.E.2d at 878.

107. *Id.* at 878-79.

108. *Id.* at 879.

E. Security Deposit Act

In *Chasteen v. Smith*,¹⁰⁹ the landlord, Smith, brought suit for possession and damages against the tenants, Chasteen and Cox; the tenants counterclaimed for return of their security deposit. The trial court awarded Smith possession and \$2506 in damages and the tenants appealed.¹¹⁰

The tenants contended that Smith's claim for damages was barred by Indiana Code section 32-7-5-14 which requires the landlord to mail to the tenant an itemized list of damages claimed, together with a check or money order for the difference between the damages claimed and the amount of the security deposit, within forty-five days after the termination of occupancy.¹¹¹ Unless the landlord complies with the statutory notice provision, the tenant may recover from the landlord all of the security deposit together with reasonable attorneys' fees, and the landlord is barred from pursuing a claim for damages.¹¹² Smith admitted that he did not mail an itemized list of damages claimed to the tenants even though he had actual knowledge of their mailing address. However, Smith argued that by initiating the suit within the forty-five day period, he had complied with the statutory notice requirement. The Indiana Court of Appeals did not agree.¹¹³ When Smith filed the action in the small claims court he neither itemized his damages nor estimated the amount of damage attributable to each item as required by the statutory notice provision. Thus, by operation of the statute, the failure to comply with the notice requirement constituted an agreement by Smith that no damages were due.¹¹⁴ The judgment of the trial court was reversed with instructions to enter an award in favor of the tenants for the amount of their security deposit plus attorneys' fees.¹¹⁵

F. Trade Fixtures

At early common law, personality that was attached to realty in a permanent manner became a part of the realty to which it adhered under the ancient Roman maxim *quicquid plantatur solo, solo cedit* (whosoever is attached to the land yields to the land). As such, the article became a "fixture," or part of the land, and could not be removed from the land. An exception was later created for fixtures used in a trade or business by a tenant.¹¹⁶ Such

109. 625 N.E.2d 501 (Ind. Ct. App. 1993).

110. *Id.*

111. *Id.* (citing IND. CODE § 32-7-5-14 (1993)).

112. IND. CODE §§ 32-7-5-12, -15, -16 (1993); *see also* Duchon v. Ross, 599 N.E.2d 621, 623-25 (Ind. Ct. App. 1992).

113. *Chasteen*, 625 N.E.2d at 502.

114. *Id.* at 502-03. In *Raider v. Pea*, 613 N.E.2d 870, 872 (Ind. Ct. App. 1993) (citing IND. CODE § 32-7-5-12(a)(3)), the Indiana Court of Appeals held that the landlord was not liable for failure to provide the tenant with the statutory notice of damages until the tenant had "supplied" the landlord with a mailing or forwarding address. However, the *Chasteen* court concluded that Smith, by admitting that he had actual knowledge of the tenants' mailing address, could have complied with the notice of claim provision and *Raider* was therefore distinguishable. *Chasteen*, 625 N.E.2d at 503 n.1.

115. *Id.* at 503.

116. For a discussion of the right of a tenant to remove trade fixtures, see SCHOSHINSKI, *supra* note 55, §§ 5:29-5:31.

"trade fixtures" can be removed from the leased premises by the tenant at the end of the lease term if they can be removed without substantial damage to either the chattel or the freehold, provided they can be used by the tenant at another location.¹¹⁷ The right of a tenant to remove a trade fixture from the leased premises at the end of the term was raised in *Roebel v. Kossenyans*.¹¹⁸

In *Roebel*, the landlord, Roebel, brought an action against the tenant, Kossenyans, for removing incandescent "can" lighting from the leased premises at the end of the lease and for damages to the premises. The facts established that at the beginning of the lease, the premises consisted only of blank white walls, fluorescent lights, and heat. Additionally, Kossenyans agreed to take the premises "as is." Kossenyans, who intended to operate a restaurant on the premises, purchased and installed recessed "can" incandescent lighting and dimmers to create an appropriate atmosphere for an upscale restaurant. At the end of the lease, Kossenyans removed the "can" lighting from the leased premises and installed it in his new restaurant. The removal of the lighting did not cause any damage to the ceiling, although its removal left openings in the ceiling where the lights had been installed. Roebel subsequently had "can" lighting reinstalled in the holes left in the ceiling at the insistence of his new tenant who also intended to operate an upscale restaurant on the premises. The trial court found that the lighting was a trade fixture that Kossenyans had a right to remove at the end of the term and that no damages were caused by the removal of the lighting.¹¹⁹ Roebel appealed the judgment of the trial court.¹²⁰

Roebel contended that the trial court erred in finding that the incandescent "can" lighting was a trade fixture. The Indiana Court of Appeals approved the definition of a trade fixture used by the trial court: "A trade fixture is defined under Indiana law as personal property put on the premises by the tenant which can be removed without substantial or permanent damage to the premises and is capable of being set up or used in business elsewhere."¹²¹ As to the right of a tenant to remove trade fixtures at the end of the term, the trial court substantially used the test set forth in *New Castle Theater Co. v. Ward*:¹²² "'As between landlord and tenant, the general rule is that the tenant may remove trade fixtures within the term of his lease, if they are capable of being detached without material injury to the freehold or themselves, and of being set up and used elsewhere.'"¹²³ The *Roebel* court concluded that the "can" lighting was indeed a trade fixture.¹²⁴ It was considered essential by Kossenyans, who had ten years' experience in the restaurant business, to create a proper ambiance for an upscale restaurant, and Kossenyans had re-installed the "can" lighting in his new restaurant.¹²⁵

117. CUNNINGHAM ET AL., *supra* note 54, §6.48, at 364-65. For a more detailed discussion of the law governing trade fixtures, see SCHOSHINSKI, *supra* note 55, §§ 5:29-5:33.

118. 629 N.E.2d 241 (Ind. Ct. App. 1994).

119. *Id.* at 242.

120. *Id.*

121. *Id.* at 242-43 (quoting Record at 10).

122. 104 N.E. 526 (Ind. App. 1914).

123. *Roebel*, 629 N.E.2d at 243 (quoting *New Castle*, 104 N.E. at 528).

124. *Id.* at 244.

125. *Id.* at 243.

Finally, Roebel argued that even if the lighting was a trade fixture, the trial court erred in finding that its removal did not cause any damage to the leased premises. The court apparently interpreted Roebel's argument as a claim that trade fixtures cannot be removed from the leased premises by the tenant if their removal will cause any damage to the freehold. In rejecting this position, the court observed that the trial court was not required to find the absence of any damage to the leased premises in order to permit the removal of trade fixtures at the end of the lease. Under Indiana law, trade fixtures can be removed unless their removal would cause "substantial or permanent damage" to the premises.¹²⁶ Here the evidence supported the trial court's finding that the removal of the "can" lighting caused no substantial or permanent damage to the leased premise. Therefore, the judgment was affirmed.¹²⁷

V. PURCHASE AGREEMENT: STATUTE OF FRAUDS

The English Statute of Frauds requires written evidence of the terms and conditions of a contract or sale of real property signed by the party to be charged with the contractual obligation.¹²⁸ The written memorandum may consist of several writings, if each writing is signed by the party to be charged and indicates that it is related to the same transaction.¹²⁹ Furthermore, a document written after the contract for sale has been performed can be used to prove the terms and conditions of the contract and satisfy the Statute of Frauds.¹³⁰ The requirement that there be a written memorandum of the contract for the sale of land satisfying the Statute of Frauds was raised in *Newman v. Huff*.¹³¹

In *Newman*, Marie Henderson, because of her declining health, decided to sell rental property consisting of eight apartment units located at 6002 Fullerton Avenue, Buena Park, California, to her friends Jesse and Jane Newman ("the Newmans"). For tax reasons, Henderson desired an arrangement whereby she could obtain monthly income for life. The purchase agreement provided that the Newmans would make a downpayment of \$19,000, with the balance of the purchase price (\$225,000) payable by a promissory note at the prevailing interest rate. The "interest only" on the note was to be paid in monthly installments of \$2,062.50, with the principal on the note due in either ten or fifteen years at the Newmans' option. Henderson orally agreed that if the Newmans

126. *Id.* at 244. If the landlord was in fact arguing that trade fixtures cannot be removed by the tenant where damage to the lease premises will occur, this position is inconsistent with a covenant in the lease providing that upon removal of any trade fixtures from the leased premises: "Tenant shall repair any damages to the premises caused by such removal." *Id.* at 241-42.

127. *Id.* at 244.

128. Stat. 29 Car. II, c.3 § 4 (1677). The Indiana version of the Statute of Frauds is found in IND. CODE § 32-2-1-1 (1993).

129. *Wertheimer v. Klinger Mills Inc.*, 25 N.E.2d 246, 247-48 (Ind. 1940); *Block v. Sherman*, 34 N.E.2d 951, 953 (Ind. App. 1941).

130. *Newman v. Huff*, 632 N.E.2d 799, 803 (Ind. Ct. App. 1994) (citing *Smith v. Hunt*, 98 N.E.2d 841 (Ind. App. 1912)).

131. *Id.* at 802.

timely made the monthly interest payments, the unpaid balance of the note would be forgiven at her death.¹³²

The real estate closing took place on January 3, 1984. Henderson conveyed the property to the Newmans by a grant deed and the Newmans executed a promissory note secured by a deed of trust with the Grover Escrow Corporation named as trustee. The corporate trustee was to reconvey the property to the Newmans when the note was paid. On January 19, 1984, Henderson executed a will stating that the balance of the note should be forgiven at her death and that the Newmans should take the property free and clear of any obligation to Henderson's estate. A subsequent 1986 will reiterated that the balance of the note arising from the sale of the Buena Park property was to be given to the Newmans "in accord with a contractual agreement made when [she] sold these units to Mr. Newman but never put in writing."¹³³

After learning of Henderson's death in 1991, the Newmans ceased direct payments on the note, but continued to make payments into a trust account pending the outcome of two actions filed by the Newmans against Henderson's estate, the executor of her estate, and the legatees. The first action sought the return of any payments made and funds expended and the reasonable value of services rendered, or, in the alternative, specific forgiveness of the note and delivery of title.¹³⁴ The trial court granted the legatees' motion to dismiss for failure to state an actionable claim.¹³⁵ In the second action, the Newmans sought specific performance of the agreement to devise the unpaid balance of the note—\$225,000.¹³⁶ The trial court granted summary judgment in the estate's favor.¹³⁷ The Newmans appealed the two decisions, which were consolidated for review.¹³⁸

The Newmans contended that the provisions in the wills served as a written memorandum evidencing the existence of an agreement in the contract for sale of the real estate that the unpaid principal on the note would be forgiven at Henderson's death.¹³⁹ The Indiana Court of Appeals observed that the agreement between the parties that the unpaid balance of the note would be forgiven at Henderson's death was not reduced to writing until after "the real estate sale, promissory note and trust arrangement had been consummated."¹⁴⁰ Nevertheless, the court determined that the subsequent memorialization of the oral agreement in Henderson's will satisfied the Statute of Frauds.¹⁴¹ The will on its face showed that the obligation to forgive the debt "arose at the time of, and in connection with, the sale of the property to the Newmans."¹⁴²

The estate first argued that the promise to forgive the note and reconvey title was made without consideration and unenforceable; and, secondly, that it was a separate oral

132. *Id.* at 801.

133. *Id.* at 802 (quoting Record at 111).

134. *Id.* n.2.

135. *Id.* n.3.

136. *Id.* n.2.

137. *Id.* n.3.

138. *Id.* at 802.

139. *Id.*

140. *Id.* at 803.

141. *Id.* at 804.

142. *Id.*

promise and not part of the consideration for the sale. The court did not agree: "Marie's promises to forgive the debt and to reconvey title at her death were integral parts of the original bargain struck by the parties."¹⁴³ In a "strikingly similar" case, *Cadigan v. American Trust Co.*,¹⁴⁴ the court noted that the California Court of Appeals found a promise to remit the unpaid portion of the principal of a promissory note upon the death of the payee to be an integral part of the bargain and the major inducement for the purchase of property.¹⁴⁵ While Henderson's will used the word "gift," it also stated that the forgiveness was part of the contractual agreement. Unlike a gift or testamentary devise, the Newmans were bound to perform the terms of the contract during Marie's life.¹⁴⁶ Therefore, the judgment was reversed and the cause remanded for further proceedings.¹⁴⁷

In discussing the enforceability of the contract agreement to forgive the balance of the note at Henderson's death, the court observed that the single issue was whether the provision in the grantor's will can be used to satisfy the written memorandum requirement of the Statute of Frauds to prove the otherwise oral promise in the original purchase agreement.¹⁴⁸ Had the duty or obligation to forgive the debt been created by the will, the enforceability of the obligation would depend upon the validity of the will.¹⁴⁹ However, since the obligation to forgive the debt at the vendor's death was a part of the original contract of sale, the writing signed by the testatrix/vendor can satisfy the Statute of Frauds even if the will is held invalid or is subsequently revoked by the testatrix.¹⁵⁰

VI. SERVITUDES: EASEMENTS AND COVENANTS

A. *Implied Easements*

An implied easement can arise at the time of a conveyance. For an implied easement based on prior use to arise at the time of the severance of a tract of land, it is necessary to establish that during the unity of title, a permanent and obvious servitude was imposed on one part of the land for the benefit of the other, and that at the time of the conveyance, the continued use of the easement was reasonably necessary for the enjoyment of the dominant estate.¹⁵¹

143. *Id.* at 805.

144. 281 P.2d 332 (Cal. Ct. App. 1955).

145. *Newman*, 632 N.E.2d at 805. In *Cadigan*, the landlord agreed to sell the rental property to the tenants with a small downpayment and monthly payments, and orally represented that the balance of the note would be cancelled upon the landlord's death. A letter written by the landlord four months after the purchasers had signed the note and deed of trust confirmed the oral agreement that the remaining balance would be cancelled upon her death. The court found that the promissory note, deed of trust, and the letter constituted a single contract. *Cadigan*, 281 P.2d at 334.

146. *Newman*, 632 N.E.2d at 807.

147. *Id.*

148. *Id.* at 802-03.

149. It should be noted that the facts of this case indicate that the Newmans are presently contesting the probate of a later will executed by Marie in 1987. *Id.* at 802 n.4.

150. *Id.* at 804.

151. CUNNINGHAM ET AL., *supra* note 54, § 8.4, at 445; see also John Hancock Mut. Life Ins. Co. v.

In *Reed v. Luzny*,¹⁵² George Luzny, the owner of property, subsequently divided it into two tracts and installed water and sewer pipes running from his residence on one part of the property to a commercial building located on the other. Anna Luzny, the current owner of the residential tract, conveyed the tract with the commercial building to Reed by warranty deed in September 1980. Luzny had paid the water and sewer services supplied to the Reed property since the conveyance. In January 1992, Luzny sought a declaratory judgment allowing her to discontinue the gratuitous supply of utility services to the Reed property. The trial court granted Luzny's motion for summary judgment finding that there was no implied or prescriptive easement and Reed appealed.¹⁵³

Reed contended that the trial court should have found an implied easement based on the generally recognized rule of law that where, during the unity of title, one part of the land is used for the benefit of another part, and where, at the time the parts are severed, the easement is apparent and reasonably necessary for the enjoyment of the dominant estate, the law will imply the continuance of an easement.¹⁵⁴ Luzny contended that providing free utilities is a service rather than an easement. The Indiana Court of Appeals, however, agreed with Reed that the supplying of utility services through underground pipes was a use of the land and hence an easement.¹⁵⁵

This ruling by the court is questionable. The burden on the servient tenant involves more than just allowing utility services to be supplied through pipes running beneath the servient estate. Supplying free utility services is an affirmative covenant. It requires the owner of the servient estate to pay utility bills for the owner of the dominant estate.¹⁵⁶ However, the question of whether or not the court was correct in classifying the servitude as an easement became moot when the court found that no implied easement was created.¹⁵⁷ To establish the existence of an implied easement by prior use, the party asserting the easement must show that it was reasonably necessary for the fair enjoyment of the land at the time the property was severed. Here, Reed admitted that he could have obtained water and sewer services for the building by alternative means, even though, "in doing so[,] he would incur 'considerable' expense and rearrangement of his premises."¹⁵⁸ Therefore, the judgment was affirmed.¹⁵⁹

Patterson, 2 N.E. 188, 190-91 (Ind. 1885).

152. 627 N.E.2d 1362 (Ind. Ct. App. 1994).

153. *Id.* at 1363.

154. *Id.* (citing *John Hancock*, 2 N.E. at 191).

155. *Reed*, 627 N.E.2d at 1364.

156. An affirmative covenant requires the owner of the burdened estate to perform a positive act for the benefit of the owner of the benefitted estate. RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 389 (4th ed. 1991).

157. *Reed*, 627 N.E.2d at 1365.

158. *Id.* at 1364-65. For a discussion of the amount of necessity required to establish an implied easement based on prior use in Indiana, see Walter W. Krieger, *Recent Developments in Indiana Law*, 25 IND. L. REV. 1375, 1380-83 (1992).

159. *Id.* at 1365.

B. Creation and Termination of Servitudes

*Oakes v. Hattabaugh*¹⁶⁰ involved both the creation of an express easement and the termination of a restrictive covenant. In *Oakes*, Bales and Pitts, who jointly owned a parcel of land, divided their property into lots and sold them at a public auction. Lot Nineteen was purchased by Kent and Lot Twenty was purchased by the Meyers. Both deeds indicated that there was a fifty-foot wide easement across the Meyers' property for ingress and egress, and that the maintenance of the easement would be shared pro rata among the users. The deeds did not, however, identify the dominant estate. The two deeds also contained restrictive covenants prohibiting "nonresidential uses and buildings, noxious or offensive activities, and signs larger than one square foot."¹⁶¹

The Kent property, Lot Nineteen, which was situated east of a portion of the easement, would have been landlocked without the right to use the easement. In June 1988, the Meyers conveyed Lot Twenty to the Oakes. The deed set forth the easement on the property, but did not refer to any specific restrictive covenants, although the deed did indicate that the grantees took "subject to all easements, rights-of-way, restrictions and agreements of record."¹⁶² In 1988, the Oakes constructed a barn on the property and began raising farm animals. At the entrance of the driveway, the Oakes erected a sign reading "Oakshire Estates and Stables."¹⁶³ Later the Oakes improved the easement with gravel at a cost of \$5000 and requested that Kent pay \$2500 of the expense. Kent refused, and therefore in January 1991, the Oakes filed suit against Kent for \$2500. Kent filed a counterclaim for injunctive relief, charging the Oakes with violating the restrictive covenants by building the barn and fence, stabling horses and donkeys, and erecting the sign. Big Ten Developers ("Big Ten"), who owned 375 acres of land adjacent to the Oakes' property, intervened, claiming a perpetual easement across the Oakes' land. The trial court granted Big Ten a perpetual easement across the Oakes' property, ordered Kent to reimburse the Oakes \$2500, and granted the injunction sought in Kent's counterclaim.¹⁶⁴ The Oakes appealed the judgment on the counterclaim and Big Ten's third-party claim.¹⁶⁵

With regard to Big Ten's claim to an easement, the Indiana Court of Appeals noted that while the Oakes' property was obviously the servient estate, since the easement was located upon their land, the description of the easement in the Meyers', Kent's, and the Oakes' deeds did not identify the dominant estate.¹⁶⁶ Thus, the court reversed the portion of the judgment granting Big Ten a perpetual easement across the Oakes' property.¹⁶⁷

160. 631 N.E.2d 949 (Ind. Ct. App. 1994).

161. *Id.* at 951.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 952. While the failure to set forth the dominant tenement would appear to preclude the use of the easement by Kent, the court observed that the Oakes had never challenged Kent's right to use the easement and in fact claimed compensation for Kent's use of the easement. *Id.* at n.3.

The court then turned to the restrictive covenants and the granting of Kent's counterclaim for injunctive relief. The court did not agree with the Oakes' contention that the restrictive covenants were intended only to bind the original parties to the deeds from Bales and Pitts.¹⁶⁸ Instead, the court found that the language in the deeds providing that the covenants last for twenty-five years was evidence of an intent that the covenants should run with the land.¹⁶⁹ Nevertheless, the court agreed with the Oakes that the covenants should not be enforced because of laches and acquiescence.¹⁷⁰ In 1988, the Oakes built their barn to board their horses, improved the dirt driveway with gravel, built a fence, erected a sign at the entrance to the driveway, and began raising farm animals. Later, the Oakes built a house on Lot Twenty and bought an adjacent field. Kent waited for approximately two years before complaining about the violations of the covenants. The court found that this delay was prejudicial because the Oakes built their house and bought additional land after the violations were committed without objection.¹⁷¹ Kent's silence was an implied acquiescence of the violations. The court found that it would be inequitable to require the removal of the items, and vacated the trial court's injunction.¹⁷²

In *Coffin v. Hollar*,¹⁷³ Sarah and Cordie Coffin conveyed land near Cedar Lake to their daughter Mylene Hollar. The land conveyed to Hollar was separated from Cedar Lake by other land owned by the Coffins, upon which they operated a resort. The deed from the Coffins to Hollar granted a ten-foot wide easement across the resort property to provide access to Cedar Lake. After the death of Hollar's father, Hollar's mother began conveying the resort property to Hollar's brother, Merritt Coffin. In 1983, Merritt's son, Terry, erected a fence between the Hollar property and the resort property while Hollar was away for an extended period. Hollar objected to the location of the fence without a survey establishing the boundaries, and in 1986 a survey established that the fence was on Hollar's property. In 1988, Merritt became the owner of the resort property and transferred the property to a trust. Terry then began buying the property from the trust. In either 1991 or 1992, Terry barred Hollar's access to the resort property, including the easement, and Hollar filed suit asking that all obstructions to her easement and the fences encroaching upon her land be removed. Terry admitted to interfering with Hollar's use and enjoyment of the easement and to encroaching on her land with the fence, but raised the affirmative defenses of adverse possession, laches and estoppel. Terry appealed the judgment in favor of Hollar.¹⁷⁴

On appeal, the Indiana Court of Appeals determined that Terry had failed to prove all of the elements of adverse possession.¹⁷⁵ Although Hollar had not used the easement

168. *Id.* at 952.

169. *Id.*

170. *Id.* at 953. The court observed that laches "is comprised of 1) an inexcusable delay in asserting a right, 2) an implied waiver from a knowing acquiescence in existing conditions, and 3) prejudice to the adverse party." *Id.* (citing LaPorte Prod. Credit Ass'n v. Kalwitz, 567 N.E.2d 1202, 1204 (Ind. Ct. App. 1991), *trans. denied*, Mar. 2, 1992).

171. *Id.*

172. *Id.*

173. 626 N.E.2d 586 (Ind. Ct. App. 1993).

174. *Id.* at 588.

175. *Id.* at 589.

across the resort land very often in the past, and had allowed the resort to establish campsites on the easement, she did so because she was allowed passage over all parts of the resort property and had no need to use the easement. The resort's use of the easement before Terry terminated Hollar's access to the resort area could not be deemed hostile, an element necessary to establish title by adverse possession.¹⁷⁶

Terry also argued that Hollar's claim to the easement across the resort property and her contention that the fences encroached upon her land were barred by laches. The court observed that “[l]aches is comprised of three elements: inexcusable delay in asserting a known right; an implied waiver arising from knowing acquiescence in existing conditions; and a change of circumstances causing prejudice to the adverse party.”¹⁷⁷ It was not until Terry terminated Hollar's access to the resort property that she needed to assert her right to the easement, which she did by filing this action two or three months later. In addition, she objected to the location of the fence from the time Terry began its construction. She could not be said to have slumbered on her rights. Therefore, the court affirmed the judgment.¹⁷⁸

C. Restrictive Covenants: “Residential Purposes Only”

Two decisions during this Survey period discuss the scope of a restrictive covenant limiting the use of property to “residential purposes only.” In *Stewart v. Jackson*,¹⁷⁹ the Stewarts brought an action to prevent their neighbors, Leigh and Rodney Jackson, from operating a day care facility in their home. Leigh Jackson had applied to the Evansville Board of Zoning Appeals for a special use permit required by city ordinance to care for six to ten children in her home. When Kenneth Stewart opposed the granting of the permit, Jackson withdrew the application and reduced her home day care to five children, which did not require a special use permit. Stewart, however, filed an action seeking an injunction to prevent the Jacksons from operating a day care facility in their home, claiming that such activity violated the subdivision’s restrictive covenant, which limited the use of the lots to residential purposes only and expressly prohibited any commercial or business activity.

During a bench trial, the evidence established that there were four other day care homes in the neighborhood, that other neighbors operated commercial activities out of their homes, and that the Stewarts themselves had violated the covenants by operating two businesses out of their home—a general contracting construction company and a wholesale toy business. In addition, other neighbors testified that the day care facility operated by the Jacksons was an asset to the neighborhood. In ruling in the Jacksons’ favor, the trial court found that the Stewarts had substantially violated the covenants, that the Jacksons had not violated the covenants, and that the restrictive covenant prohibiting home day care was void as against public policy.¹⁸⁰

On appeal, the Indiana Court of Appeals first addressed the trial court’s conclusion that the Stewarts were estopped from bringing the action by the doctrine of “unclean

176. *Id.*

177. *Id.* (citing *Lowry v. Lowry*, 590 N.E.2d 612, 621 (Ind. Ct. App. 1992)).

178. *Id.* at 589-90.

179. 635 N.E.2d 186 (Ind. Ct. App. 1994).

180. *Id.* at 188-89.

hands" because they themselves had substantially violated the restrictive covenant. Although the court observed that one who seeks equity must be free of wrongdoing in the matter before the court, it also noted that "Indiana has recognized the ability to purge oneself of wrongdoing, which effectively restores the right to equitable relief."¹⁸¹ The court reasoned that because the Stewarts no longer operated any business from their home, they had purged themselves of wrongdoing and reversed the trial court's findings that the action was barred by the doctrine of unclean hands.¹⁸²

The Stewarts further contended that the trial court erred as a matter of law in holding that home day care was not a commercial activity that violated the restrictive covenant. The court stated that the statutory definition of a "child care home" is "a residential structure in which at least six (6) children [at a time] (not including the children [of the provider]) . . . receive child care from a provider . . . for more than four (4) hours but less than twenty-four (24) hours in each of ten (10) consecutive days per year, excluding intervening Saturdays, Sundays, and holidays."¹⁸³ Therefore, Indiana does not require a license to care for five or less children in one's home. Since Leigh Jackson cared for less than six children in her home, the court limited its consideration to an unlicensed home day care.¹⁸⁴

While the Stewarts contended that this was a case of first impression in Indiana, the court noted that it had struggled with a similar question with regard to the operation of group homes in residential subdivisions. In *Clem v. Christole, Inc.* ("Clem I"),¹⁸⁵ the Indiana Court of Appeals divided on whether group homes are in violation of restrictive covenants prohibiting commercial activities. The Indiana Supreme Court granted transfer in the case ("Clem II") and concluded that Indiana Code section 16-13-21-14(a),¹⁸⁶ which prevented the enforcement of restrictive covenants prohibiting the operation of group homes in residential subdivisions, violated the contract clause of the Indiana Constitution.¹⁸⁷

The Stewart court observed that a minority of the supreme court in *Clem II* believed that the restrictive covenants did not prohibit the establishment of group homes in residential subdivisions, and in its analysis concluded that the restrictive covenants were never intended to exclude home day care.¹⁸⁸ Similarly, in *Minder v. Martin Luther Home Foundation* ("Minder II"),¹⁸⁹ although the supreme court reversed the court of appeals, which had held that group homes are residential and not business uses ("Minder I"),¹⁹⁰ it

181. *Id.* at 189-90.

182. *Id.* at 190.

183. *Id.* (quoting IND. CODE § 12-7-2-28.6 (1993)).

184. *Id.* In passing, the court noted that a child care center usually refers to a "nonresidential structure where at least seventeen children receive child care." *Id.* (citing IND. CODE § 12-7-2-28.4 (1993)). The Jacksons were not operating a "child care center," and the court made no determination as to whether such a center would be a violation of the restrictive covenant. *Id.* at 190.

185. 548 N.E.2d 1180, 1187 (Ind. Ct. App. 1990).

186. IND. CODE § 16-13-21-14(a) (repealed 1993).

187. 582 N.E.2d 780, 785 (Ind. 1991).

188. *Stewart*, 635 N.E.2d at 190-91 (citing *Clem II*, 582 N.E.2d at 786).

189. 582 N.E.2d 788 (Ind. 1991).

190. *Minder v. Martin Luther Home Found.*, 558 N.E.2d 833, 835 (Ind. Ct. App. 1990).

did so for the constitutional reason stated in *Clem II*, but remanded back to the trial court to decide whether group homes violated the restrictive covenants.¹⁹¹

The *Stewart* court noted that decisions in other states deciding whether private residence day care violates “residential use only” covenants were divergent, but examined decisions from Michigan and Washington that held that a residence day care does not violate such restrictive covenants.¹⁹² In *Beverly Island Ass’n v. Zinger*,¹⁹³ the Michigan Court of Appeals held that such covenants are to be construed strictly in favor of the free use of property and concluded that restrictions allowing residential use of land permitted a wider use than restrictions prohibiting commercial or business use.¹⁹⁴ Business or professional use does not constitute a per se violation of a residential use restriction.¹⁹⁵ The *Beverly Island* court also acknowledged that day care licensing reflected Michigan’s policy to provide for “the protection, growth and development of children,” and concluded that day care homes are residential uses of property.¹⁹⁶

Next, the *Stewart* court reviewed *Metzner v. Wojdyla*,¹⁹⁷ in which the Washington Court of Appeals held that an in-home day care for ten children did not violate a “residential purposes only” covenant. The *Metzner* court based its decision on three factors: “1) the use of the home for day care was incidental to the residential use, 2) the day care was small and not significantly more intrusive than normal single-family activity, and 3) child care is an activity customarily incident to residential use of property.”¹⁹⁸ Thus, the *Stewart* court concluded that these restrictive covenants never contemplated the exclusion of unlicensed day care homes as commercial businesses.¹⁹⁹

The court also examined Indiana’s public policy toward home day care. It noted the creation of the board for the coordination of child care regulation, which studies the necessity of programs to meet child care needs of Indiana residents, assesses the availability and projected need for safe and affordable child care, and reports its findings to the Indiana General Assembly.²⁰⁰ One of the board members testified at the trial that most parents choose in-home day care when available over day care centers because it simulates the family, allows children to learn and play at their own individual levels, and is more accommodating to parents’ different work schedules because of more flexible hours.²⁰¹ The General Assembly’s decision not to regulate or monitor small home day care was further evidence of Indiana’s policy favoring home day care.²⁰² Thus, the court

191. *Minder*, 582 N.E.2d at 789.

192. *Stewart*, 635 N.E.2d at 191.

193. 317 N.W.2d 611 (Mich. Ct. App 1982).

194. *Id.* at 613.

195. *Id.*

196. *Id.* at 614-15.

197. 848 P.2d 1313 (Wash. Ct. App. 1993), *rev’d*, 886 P.2d 154 (1994).

198. *Stewart*, 635 N.E.2d at 192 (citing *Metzner*, 848 P.2d at 1316-17).

199. *Id.* at 193.

200. *Id.* (citing IND. CODE §§ 12-17.2-3-1 to -11 (1993)).

201. *Id.*

202. *Id.*

concluded that home day care is a residential use within the meaning of the residential use covenant.²⁰³

Finally, the court noted that if it had found that unlicensed residential day care violates the covenant, it still would have affirmed the trial court's denial of injunctive relief based on the Stewarts' acquiescence of other day care homes in the neighborhood.²⁰⁴ In determining acquiescence, the court noted that it must consider three factors:

- 1) the location of the objecting landowners relative to both the property upon which the nonconforming use is sought to be enjoined and the property upon which a nonconforming use has been allowed; 2) the similarity of the prior nonconforming use to the nonconforming use sought to be enjoined; and 3) the frequency of prior nonconforming uses.²⁰⁵

Here, four other day care homes were located within two blocks. Kenneth Stewart admitted that he was aware of two day care homes, one at the end of the street and one on the other side.²⁰⁶

In *Bagko Development Co. v. Damitz*,²⁰⁷ the Damitzes purchased two adjoining lots in Willowridge Subdivision. They constructed a \$400,000 residence on one lot and a Little League baseball practice field (infield and batting cage) on the other. The practice field lot included a complete infield, an underground sprinkler system, a batting cage, a pitching machine and lighting. The total investment in the practice field exceeded \$45,000. The Damitzes had three boys, ages ten, seven and five. Mr. Damitz coached two Little League teams and used the field two or three times a week during the Little League season for infield practice. No games were played on the field and neighbors testified that they had never seen a baseball hit off the lot. When the field was not being used for practice, neighborhood children used the field to play soccer, football and baseball with whiffle balls.²⁰⁸

The Longworths, neighbors, and Bagko, the subdivision developer, sought a permanent injunction to prevent both the maintenance and use of the lot as a Little League practice field, claiming that it violated both the subdivision covenant limiting the use of the lots to "residential purposes," and the lot's R1-zoning.²⁰⁹ The trial court denied an injunction, finding that the development and use of the lot violated neither the restrictive covenant nor the zoning ordinance.²¹⁰

Bagko claimed that the trial court erred as a matter of law in finding that the use of the lot as a practice facility did not violate the "for residential purposes only" restrictive covenant. The Indiana Court of Appeals noted that the term "for residential purposes"

203. *Id.* at 193-94.

204. *Id.* at 194.

205. *Id.* (citing *Hrisomalos v. Smith*, 600 N.E.2d 1363, 1368 (Ind. Ct. App. 1992)).

206. *Id.*

207. 640 N.E.2d 67 (Ind. Ct. App. 1994).

208. *Id.* at 69.

209. *Id.* at 69-70. The plaintiffs also claimed that the use of the lights on the practice field created a nuisance. This issue is discussed *infra*, at note 216.

210. *Bagko*, 640 N.E.2d at 70. The court also found that the use of the practice field was not a nuisance. *Id.*

was not defined in the covenants.²¹¹ It observed that residential use is to be distinguished from commercial or business use. Similarly, other authorities have suggested that “for residential purposes” merely limits the use to living purposes as distinguished from business or commercial purposes.²¹² The trial court found that in the community, “‘residential use’ includes the construction and use of tennis courts, basketball courts, and swimming pools.”²¹³ Thus, the court found that the trial court’s conclusion that the recreational use of the lot as a baseball practice field was not a violation of the covenant was not clearly erroneous.²¹⁴

Bagko also contended that the use of the lot as a practice field violated the county zoning ordinance. The ordinance listed two permitted uses of property zoned R1-Residential: single-family dwellings; or public parks, playgrounds, or recreational areas. Bagko argued that since the lot was not being used for either of these stated purposes, its use violated the zoning ordinance. The court noted that, under this rationale, if a person purchased a lot zoned R-1, until they built a structure on the lot, they could not picnic or play volleyball on the lot.²¹⁵ A building permit may be obtained to build a house on two lots even though the house is built on one of the lots. Thus, the Damitzes had one parcel consisting of two lots, and the parcel was primarily used for a single-family dwelling costing in excess of \$400,000. The use of a portion of the parcel as a practice field for approximately 8.75 hours a week for about ten weeks out of the year was an accessory use subordinate to the primary use as a residence. Thus, the court held that the trial court’s finding that the use of the practice field was not a violation of the zoning ordinance was not clearly erroneous.²¹⁶

211. *Id.*

212. *Id.*

213. *Id.* at 71 (citing Record at 472).

214. *Id.*

215. The court observed that in *Boone County Area Plan Comm’n v. Kennedy*, 560 N.E.2d 692, 696 (Ind. Ct. App. 1990), the court found a 15-acre private skeet range within a 40-acre parcel on which the owner maintained a “country home” an accessory use of the real estate. *Bagko*, 640 N.E.2d at 71. The primary purpose of a parcel can be residential use and recreational development on the parcel is only an accessory use of the land.

216. *Bagko*, 640 N.E.2d at 71-72. The court also discussed the issue of whether the practice field lights might be a nuisance. Bagko contended that the finding of the trial court that the use of lights producing a total rating of 144,000 lumens did not constitute a nuisance was erroneous as a matter of law. While the lights, when turned on, shined through the Longworths’ bedroom window, the evidence indicated that the lights had only been used six or seven times from July 28, 1991 to the date of the trial, and that the Longworths had not complained on any of those occasions. Furthermore, the first time the lights were used, Mr. Damitz called Mr. Longworth and indicated that he should let him know if they bothered him. No complaint was made. Under these facts, the court was not willing to overrule the trial court’s determination that the practice field lights did not create a nuisance. *Id.* at 72-73.

RECENT DEVELOPMENTS UNDER THE INDIANA CONSTITUTION

RICHARD A. WAPLES*

INTRODUCTION

The last year was marked by a sharp increase in the number of reported state court decisions construing provisions of the Indiana Constitution. The Indiana Supreme Court appears earnest about creating independent Indiana constitutional doctrine. Cases involving free speech, riverboat gambling, curbside trash, corporate reputations and equal privileges and immunities have all come before our appellate courts and received unique state constitutional analysis. While at times individual rights have been vindicated, the emerging doctrine is generally restrictive of individual liberty. With few exceptions, Indiana courts have granted considerable deference to the other two branches of state government, aligning with the state and against the individual. This Survey collects and comments on those decisions.

I. FREE SPEECH

Perhaps the most significant state constitutional decision in the past year is *Price v. State*.¹ In *Price* the individual prevailed, but the test the court adopted appears to enhance the government's ability to regulate speech. Nevertheless, *Price* represents a major and original shift in the supreme court's free speech jurisprudence, and a sincere attempt to breathe new life into the Indiana Constitution.²

The facts in *Price* are as follows: The police were called to a raucous New Year's Eve party in Indianapolis and attempted to break up a crowd in the street. They confronted and arrested one particularly unruly party-goer. Another member of the crowd, Colleen Price, loudly objected to the arrest, and an officer threatened to arrest her if she did not quiet down. Ms. Price responded "f--- you. I haven't done anything." The police then arrested Price, charging her with public intoxication,³ disorderly conduct,⁴ and interfering with a law enforcement officer by force.⁵ After a bench trial, she was convicted of disorderly conduct and public intoxication, but acquitted on the interfering count.⁶ Price appealed the disorderly conduct charges, but the trial court and the court of appeals rejected her constitutional challenge which was premised upon Indiana's free speech guarantee.⁷ Both lower courts analyzed the issue as if the challenge had been based upon the First Amendment to the United States Constitution. The Indiana Supreme

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1. 622 N.E.2d 954 (Ind. 1993).
2. See Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).
3. See IND. CODE § 7.1-5-1-3 (1993).
4. See *id.* § 35-45-1-3(2).
5. See *id.* § 35-44-3-3(a)(1).
6. *Price*, 622 N.E.2d at 956-57.
7. See *Price v. State*, 600 N.E.2d 103 (Ind. Ct. App. 1992).

Court granted transfer and reversed the disorderly conduct conviction based on Article I, Section 9 of the Indiana Constitution.⁸

The court observed that it had not had many opportunities “to explicate the scope of Article I, [Section] 9,”⁹ despite the clause’s 142 years of existence. The court then used the historical framework for analysis that it had previously set forth in *State Election Board v. Bayh*: “Interpretation of the Indiana Constitution is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it.”¹⁰

Although the provision was never discussed during Indiana’s Constitutional Convention of 1850-51, the court found “ample indicia [in Section] 9” to illuminate its meaning.¹¹ The court relied upon the text of the section in rejecting the State’s argument that Price’s speech was outside the protection of Section 9. The court stated that the provision protects the right to speak “on any subject whatever.”¹² The relevant inquiry was whether the speech in question constituted an “abuse” of the right to speak under Section 9.¹³ This approach departs from federal jurisprudence and appears to provide greater protection in Indiana for some forms of speech.¹⁴

However, this promising development was offset by two disturbing pronouncements. First, the court in dictum said that violating “rational” statutes generally constitutes “abuse.”¹⁵ Second, the court rejected the use of overbreadth analysis under Indiana law.¹⁶ These two developments are discussed in reverse order.

The court’s perfunctory rejection of Price’s *per se* challenge to the disorderly conduct statute premised upon its overbreadth was an unfortunate self-imposed limit on the court’s power to protect individual rights.¹⁷ Price’s facial challenge contended that the statute is substantially overbroad and that, when applied as in this case, the statute is used to curtail protected speech. Price argued that the statutory phrase “unreasonable noise” gives too

8. “No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible.” IND. CONST. art. I, § 9.

9. *Price*, 622 N.E.2d at 957.

10. *Id.* (citing *State Election Bd. v. Bayh*, 521 N.E.2d 1313, 1316 (Ind. 1988)).

11. *Id.*

12. *Id.*

13. *Id.* at 959.

14. This textual approach rejects a strand of First Amendment jurisprudence that sets some forms of speech, such as obscenity, fighting words, and speech likely to lead to imminent lawless activity, outside the protection of the First Amendment. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (imminent lawless activity advocacy); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

15. *Price*, 622 N.E.2d at 960.

16. *Id.* at 958.

17. The United States Supreme Court’s overbreadth doctrine allows courts to invalidate laws directed toward unprotected speech but that sweep too broadly against protected speech. The doctrine is designed to remove the deterrent effect such laws have on free speech and render unnecessary a case-by-case narrowing of the offensive legislation. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *see generally Note, The Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

much discretion to law enforcement officers to arrest a person if the officer personally takes offense to the content of the person's speech.

In rejecting this claim, the court noted that federal overbreadth analysis is rooted in the proposition that expression occupies a "preferred" position within the Federal Bill of Rights, a status not enjoyed under the Indiana Constitution.¹⁸ Thus, Indiana courts "should focus on the actual operation of the statute at issue and refrain from speculating about hypothetical applications. . . . Unless the court concludes that the statute is incapable of constitutional application, [the court] should limit itself to vindicating the rights of the party before it."¹⁹

The court's rejection of the overbreadth doctrine can, and should, be limited to the facts of this case. Under federal constitutional jurisprudence, for the doctrine to apply, the "overbreadth . . . must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."²⁰ When an Indiana litigant makes that showing, our courts should be able to declare the statute unconstitutional and enjoin its enforcement. While the facts of Ms. Price's arrest fit well with this theory, she did not present any evidence that other people have suffered similar treatment under the disorderly conduct statute. The court should revisit the overbreadth issue in a future case that presents a more developed factual record indicating that the challenged statute is frequently used to abridge speech. The court's use of overbreadth analysis in other contexts supports its continued application in speech cases.²¹

Even more troublesome than its rejection of overbreadth analysis, the court suggested a rational basis review standard for most types of statutory restrictions on speech. The court noted: "Accordingly, while violating a rational statute will generally constitute abuse under [Section] 9, the State may not punish expression when doing so would impose a material burden upon a core constitutional value."²²

This test appears heavily weighted in favor of the state. The court recognized that the state's police power is broad and has acknowledged that this formulation makes the speech right appear illusory.²³ It also recognized that in other contexts most statutes prove rational when challenged.²⁴ By contrast, the First Amendment subjects most statutorily-based restrictions on speech to strict scrutiny.²⁵ The *Price* decision may thus leave speech

18. *Price*, 622 N.E.2d at 958 (citing *Thornhill*, 310 U.S. at 97).

19. *Id.*

20. *Broadick v. Oklahoma*, 413 U.S. 601, 615 (1973).

21. The court used an overbreadth analysis sub silentio in answering a certified question from the U.S. District Court for the Northern District of Indiana in *In Re Zumbrun*, 626 N.E.2d 452 (Ind. 1993). See *infra* notes 179-85 and accompanying text.

22. *Price*, 622 N.E.2d at 959.

23. *Id.* at 959.

24. Indiana Dep't of Envtl. Mgmt. v. Chemical Waste Mgmt., Inc., 643 N.E.2d 331 (Ind. 1994); see *infra* notes 158-78. But see *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (using rational basis review to invalidate a zoning ordinance requiring a special use permit for a proposed group home for the mentally retarded); *Plyer v. Doe*, 457 U.S. 202 (1982) (striking as irrational a Texas statute denying public education to children of illegal immigrants).

25. See, e.g., *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

with substantially less protection under Section 9. Under *Price*, it appears speech may be regulated by statute for any “rational” reason, so long as a “core constitutional value” is not “materially burdened,” and the court’s decision is unclear about which values are core.

Despite seemingly broad power ceded to the state to regulate speech, the court held out “core” values as a source of protection.²⁶

[I]n Indiana the police power is limited by the existence of certain preserves of human endeavor, typically denominated as interests not “within the realm of the police power,” . . . upon which the State must tread lightly, if at all. Put another way, there is within each provision of our Bill of Rights a cluster of essential values which the legislature may qualify but not alienate. . . . A right is impermissibly alienated when the State materially burdens one of the core values which it embodies.²⁷

What are the core constitutional values protected by Section 9? The court did not provide an exhaustive list in *Price*. It did, however, identify political speech as one of the “cluster” of values at the core of the provision, and defined that term broadly to include “mouthing-off” to a police officer.²⁸ It concluded that in 1851 when the framers removed the provision in the 1816 constitution that specifically protected the right to “examine the proceedings of the legislature, or any branch of government,”²⁹ they must have done so because the right to question governmental authority was so well-established that it needed no specific authorization in the constitution; only a general one was needed, such as the new version of Section 9.³⁰

Hopefully the analysis in *Price* will not prove an impediment to the discovery of additional broadly defined core values protected by Section 9 and other sections of the Indiana Bill of Rights. The term “cluster” is plural, not singular, and history suggests that the framers intended most forms of speech to receive plenary constitutional protection.³¹

The court relied upon the framers’ natural rights philosophy to determine whether Price’s political speech constituted “abuse” under Section 9. The framers “perceived no dichotomy between individual rights and communal needs,”³² and thus erected a system wherein “government power [is] intended to support individual freedom.”³³ Accordingly, the court concluded, the term “abuse” should be defined “to correlate the enjoyment of individual rights and the exercise of state power such that the latter facilitates the

26. *Price*, 622 N.E.2d at 960.

27. *Id.* (quoting *Milharcic v. Metropolitan Bd. of Zoning Appeals*, 489 N.E.2d 634, 637 (Ind. Ct. App. 1986)). Justice Shepard’s “material burden” test resembles Justice O’Connor’s “undue burden” test adopted by the United States Supreme Court to judge abortion regulations. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (rejecting the trimester formulation of *Roe v. Wade*, 410 U.S. 113 (1973), and subjecting all abortion restrictions to an undue burden analysis).

28. *Price*, 622 N.E.2d at 963.

29. IND. CONST. art. I § 9, cl. 1 (amended 1851).

30. *Price*, 622 N.E.2d at 962-63.

31. Cf. *Price*, 622 N.E.2d at 962-63 (“Public discourse could hardly be called an abuse which impairs the sovereign when, in fact, a hale state government requires that discourse be unfettered and forthcoming.”).

32. *Id.* at 959.

33. *Id.* at 958.

former.”³⁴ “Abuse,” then, is “that expression which injures the retained rights of individuals or undermines the State’s effort to facilitate their enjoyment.”³⁵ For political speech to constitute “abuse,” it must amount to more than a public nuisance; instead, it must inflict upon “determinant parties harm analogous to that which would sustain tort liability against the speaker.”³⁶ Because Price’s speech did not injure anyone in a tortious sense, it did not constitute abuse.

Although *Price* sets forth a unique state constitutional doctrine, it retains the primary historical approach to constitutional interpretation found in *Bayh v. Sonnenburg*,³⁷ and adopts a balancing test that seems heavily weighted in favor of the state. Colleen Price’s conviction was overturned, but the state’s power to punish speech under the Indiana Constitution appears to have been enhanced.³⁸ With time and additional cases, the court’s newly stated doctrine of core values may evolve and afford greater protection for speech than currently appears possible under the above formulation.

Whether *Price* will have continuing relevance, however, is unclear. *Price* was a three-two decision that was still pending rehearing at the end of 1994.³⁹ Moreover, in the year since its publication, no court, not even a single justice, has articulated another “cluster of essential values” within any other provision of the Indiana Bill of Rights. The court also has ignored the material burden test. Whether *Price* represents the watershed in state constitutional law, as suggested by some commentators, remains to be seen.⁴⁰

The Indiana Court of Appeals has experienced difficulty navigating in the wake of *Price*. In *Radford v. State*,⁴¹ the defendant, a hospital employee, who had been fired earlier that day, was allegedly removing hospital property when she was stopped in a corridor and questioned by a police officer. She complained, loudly, that the officer was “hassling” her and refused to cooperate. Judges Shields and Friedlander concluded that Radford’s speech, “like that of Price, protested the legality and appropriateness of police conduct.”⁴² It was therefore political speech and, given the facts, at most constituted a public nuisance but did not inflict harm upon any determinant party sufficient to sustain tort liability.⁴³ Radford’s conviction was reversed. Judge Staton, in dissent, argued that

34. *Id.*

35. *Id.*

36. *Id.* at 964. The court noted that “public nuisance” speech does not require an actual breach of the peace or threat to any individual, but “private nuisance” speech requires a showing of tortious harm to an individual. After *Price*, only the latter is sufficient to constitute abuse. *Id.* at 963-64.

37. 573 N.E.2d 398 (Ind. 1991).

38. The United States Constitution still provides a floor for the protection of speech rights below which the State may not fall.

39. Justice Krahulik, a member of the three-member majority in *Price*, has left the court, as has Justice Givan, who joined Justice Dickson in dissent.

40. See Patrick Baude, *Has The Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994). Professor Baude praises the court’s opinion as providing a unique vision and meaning to the Indiana Constitution. For a comparison of *Price* to federal free speech jurisprudence, see Daniel O. Conkle, *The Indiana Supreme Court’s Emerging Free Speech Doctrine*, 69 IND. L.J. 857 (1994).

41. 627 N.E.2d 1331 (Ind. Ct. App. 1994) [hereinafter “*Radford I*”].

42. *Id.* at 1332.

43. *Id.* at 1333.

the majority overlooked the importance of the forum—a hospital.⁴⁴ He considered Radford's speech nonpolitical in nature because it was motivated by an effort to avoid detection of personal wrongdoing.⁴⁵ Because the speech was nonpolitical and the statute rational, Judge Staton would have upheld the conviction.

Judge Staton prevailed nine months later. The State petitioned for rehearing. Judge Shields had left the court and was replaced on the panel by Judge Bartea. Judge Staton's dissent became the majority opinion, with Judge Bartea concurring.⁴⁶ Judge Friedlander dissented for the reasons set forth in Judge Shield's previous majority opinion. The supreme court denied transfer in the case.

In *Stites v. State*,⁴⁷ the court of appeals upheld a disorderly conduct conviction based upon the defendant's loud argument with her ex-boyfriend after police had arrived and told her to be quiet. In rejecting a *Price* defense, Judge Staton, again writing for the court, noted that “[t]he mere presence of a police officer does not convert a defendant's speech into political expression.”⁴⁸

In contrast, in *Whittington v. State*,⁴⁹ Judge Staton reversed a conviction for disorderly conduct where the speech in question was a loud argument between two men that occurred in the defendant's own home and where no evidence showed that it was “detectible by anyone outside of his residence or that it ‘intolerably impaired’ another person's privacy or use of his land.”⁵⁰

The opinions in *Whittington* and *Radford II* are difficult to reconcile with each other and with *Price*. The speech in *Whittington* did not protest government action and, therefore, was not “political” in the *Price* sense. In *Radford II*, no particular individual was identified whose privacy interest was invaded, and Radford's speech, regardless of its motivation, protested police action and, therefore, fell squarely within *Price*. Finally, as noted in Judge Hoffman's dissent in *Whittington*, other members of defendant's household were subjected to the defendant's tirade, including his pregnant girlfriend who complained to police that the defendant had hit her in the abdomen.⁵¹ If *Price* survives, it will take some time for its teachings to become apparent.

44. *Id.* at 1334 (Staton, J., dissenting).

45. Whether Radford was actually doing anything illegal is unclear from the opinion. The only issue on appeal was her conviction for disorderly conduct based upon her speech. Judge Staton's distinction about the protections afforded by § 9 based upon the speaker's motivation resembles the private/public concern dichotomy under the Supreme Court's First Amendment jurisprudence for public employee speech. See *Connick v. Myers*, 461 U.S. 138 (1983).

46. 640 N.E.2d 90 (Ind. Ct. App. 1994) [hereinafter “*Radford II*”].

47. 627 N.E.2d 1343 (Ind. Ct. App. 1994).

48. *Id.* at 1345.

49. 634 N.E.2d 526 (Ind. Ct. App. 1994).

50. *Id.* at 527.

51. *Id.* at 528 (Hoffman, J., dissenting).

II. SEARCH AND SEIZURE

In *Moran v. State*,⁵² the court approved warrantless searches of curbside garbage, rejecting federal search and seizure jurisprudence, and adopting a uniquely Hoosier view of the rights of privacy under Article I, Section 11 of the Indiana Constitution.⁵³ The court reviewed the origins of Section 11 and observed that a similar provision appeared in the constitutions of various American states, including Virginia's 1776 constitution, shortly after the Declaration of Independence.⁵⁴ It appeared in the Federal Bill of Rights in 1791 as the Fourth Amendment and was replicated without change in the original 1816 Indiana Constitution. The court noted that the original purpose of the provision was to prevent abuses of police power like those in which the British engaged against the colonists.⁵⁵ The court concluded that the "primary and overarching mandate" of the provision was to ensure that the government acted reasonably.⁵⁶ In departing from federal jurisprudence, the court specifically rejected the familiar two-part *Katz* test under the Fourth Amendment.⁵⁷ This test asks first whether the individual actually possessed an expectation of privacy, and, second, whether society recognizes that expectation as reasonable.⁵⁸

The *Moran* court held that the purpose of Section 11 "is to protect from unreasonable police activity those areas of life that Hoosiers regard as private," and stated that the Section should receive a "liberal construction," to guarantee against unreasonable search and seizures.⁵⁹ The court relied upon Indiana cases decided prior to the application of the Fourth Amendment to the states to define the word "search" as "prying into hidden places for that which is concealed."⁶⁰

While recognizing that "Hoosiers are not entirely comfortable with the idea of police officers casually rummaging through trash left at curbside,"⁶¹ the court nonetheless upheld the search. The court's reasoning is curious:

52. 644 N.E.2d 536 (Ind. 1994).

53. IND. CONST. art. I, § 11 provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

The United States Supreme Court approved warrantless searches of curbside garbage under the Fourth Amendment in *California v. Greenwood*, 486 U.S. 35 (1988).

54. *Moran*, 644 N.E.2d at 539 (citing RICHARD L. PERRY, SOURCES OF OUR LIBERTIES (1959)).

55. *Id.*

56. *Id.*

57. *Id.* at 540 (citing *Katz v. United States*, 389 U.S. 347 (1967)).

58. *Id.*

59. *Id.*

60. *Id.* (quoting *Lindsey v. State*, 204 N.E.2d 357, 362 (1965) (quoting *McCoy v. State*, 170 N.E.2d 43, 48 (1960))). The court noted that if one considers "concealed" to be an objective inquiry and "hidden" to be subjective, then this standard might be understood as a precursor to *Katz*. *Id.* at 541 n.3.

61. *Id.* at 541.

We do not lightly entertain intrusions on those things that we regard as private, i.e. concealed and hidden. However, at the same time the inhabitants of this state have always valued neighborliness, hospitality, and concern for others, even those who may be strangers. Here, an open front walk leading to the front porch of a house is accurately judged by the passerby to be an open invitation to seek temporary shelter in the event of a sudden downpour. Stepping on that part of a yard next to the street or sidewalk to seek shade from a tree or to pick edible yet valueless plants growing in the lawn has been regarded proper conduct. It is permissible for children at play on the street or in the alley to examine the contents of garbage cans to find interesting items, so long as they do not make a mess. It is not infrequent that valuable items are placed in the trash in hopes that someone passing by will see them there and will take them and make good use of them. It has often been said that if you do not want others to know what you drink, don't put empties in the trash.⁶²

It seems that "Hoosier Hospitality" has the effect of diminishing the rights Indiana citizens might otherwise enjoy against police intrusions.

Justice Dickson concurred in the majority's rejection of federal jurisprudence but dissented with respect to the application of the "hidden and concealed" standard to this case.⁶³ Justice Dickson "remain[ed] convinced that Indiana citizens should be able to dispose of their trash without relinquishing their privacy."⁶⁴ He observed that one's garbage can reveal intimate, personal details of a person's religious beliefs, finances, political interests, medical and legal matters, personal relationships and numerous other confidential matters.⁶⁵ The fact that people rely upon governmental or commercial trash collection systems did not seem to Justice Dickson to diminish their reasonable expectations of privacy in those effects. He noted that if the police had probable cause to believe that the contents of curbside trash would reveal evidence of criminal wrongdoing, they could and should seek search warrants to search and seize it.⁶⁶

In *Taylor v. State*,⁶⁷ a fairly routine search and seizure case, Judge Kirsch restated basic premises of state constitutional law. First, "Indiana courts have the responsibility

62. *Id.* (footnotes omitted).

63. 644 N.E.2d at 543 (Dickson, J., dissenting).

64. *Id.*

65. *Id.*

66. Perhaps because Chief Justice Shepard recused himself from the case, the *Moran* court missed the opportunity to anchor its result in *Price*. It did not define the cluster of rights at the core of § 11 and did not question whether those rights were materially burdened. The court could have let the struggle between the refined genteel southern planter class and the rough frontiersman class, as related by Chief Justice Shepard in *Price*, 622 N.E.2d at 61-62, inform the constitutional analysis. Because this struggle was "won" by the individualistic frontiersmen, the court could have concluded that Hoosiers are more independent, libertarian, and suspicious of governmental action than the average American. This conclusion would have provided a principled basis for a broader privacy right emanating from § 11 than that contained in the Fourth Amendment. The court could have both rejected *Greenwood* and reaffirmed the unique vision of the Indiana Constitution in *Price*.

67. 639 N.E.2d 1052 (Ind. Ct. App. 1994).

of independent [state] constitution analysis. . . . [O]ur courts should decide such issues independently of federal law, and should neither defer nor grant precedential status to federal decisions interpreting analogous federal constitutional provisions."⁶⁸ If Indiana courts apply federal constitutional interpretations to state constitutional provisions, the decisions become Indiana law and remain unchanged by subsequent federal decisions altering federal interpretations.⁶⁹ The state constitutional provisions should be analyzed first. Only if the state constitution does not provide the protection should the court consider whether the act is protected by provisions of the federal constitution.⁷⁰

The *Taylor* court used these principles to reject a claim that an investigatory stop of a vehicle constituted an unreasonable seizure in violation of the Indiana Constitution, Article I, Section 11. In Section 11 cases, the court balances the individual's rights to liberty, privacy, and free movement against society's right to protect itself.⁷¹ Indiana courts permit brief investigatory stops based upon "reasonable suspicion of criminal activity."⁷² Such suspicion was present when a police officer observed Taylor in a vehicle parked in an unusual location with the vent window broken in a manner that indicated illegal entry. When the officer approached, the van sped off. The officer then turned on his red lights and pulled the van over. Because his suspicions were reasonable, the officer was justified in briefly detaining Taylor and conducting an investigation of possible criminal activity. His subsequent radio check disclosed that the van had been stolen. Accordingly, the defendant's arrest and conviction for auto theft did not violate the Indiana Constitution. Because this interpretation of the Indiana Constitution is consistent with federal interpretations of the Fourth Amendment, the court also rejected the defendant's federal claim.⁷³

III. CRIMINAL PROCEDURE

In *State v. Owings*,⁷⁴ the Indiana Supreme Court accepted transfer and affirmed the decision of the court of appeals which found no violation of the Article I Section 13⁷⁵ requirement of a face-to-face confrontation of witnesses. In Owings' trial, the prosecutor used the deposition of a witness that was taken in the absence of the defendant. The witness died prior to trial, and the defendant sought to exclude the deposition complaining that she had been unable to attend the deposition. The defendant's lawyer attended the

68. *Id.* at 1053.

69. *Id.*

70. *Id.*

71. *Id.* at 1054.

72. *Id.*

73. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968); *Alabama v. White*, 496 U.S. 325 (1990)).

74. 622 N.E.2d 948 (Ind. 1993), *aff'g* *State v. Owings*, 600 N.E.2d 568 (Ind. Ct. App. 1992).

75. IND. CONST. art. I, § 13 provides:

In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor.

deposition, but the defendant, an alleged trafficker with a prisoner at the Indiana Youth Center, was excluded from the Youth Center, where the deposition was taken.

Justice Krahulik, writing for the majority, reviewed the distinctions between the Confrontation Clause in the Sixth Amendment and the state constitution's unique language, which provides the defendant with the right to meet the witness "face-to-face."⁷⁶ Nevertheless, the court held that, like other constitutional rights, this one can be waived by word or deed.⁷⁷ Owings waived that right because she had neither made a specific request to be allowed to enter the Youth Center for the purpose of the deposition, nor attempted to have the deposition taken elsewhere.⁷⁸

In his dissent, Justice DeBruler emphasized that the record did not disclose that the right was personally waived. Before a right could be waived, he would require: "(1) an intelligent personal decision to forgo the right, (2) without coercion and (3) with a full awareness of that right."⁷⁹ Justice DeBruler admonished that "[w]hen there is judicial, legislative, and executive respect for and observance of all of the enumerated individual rights granted by this provision, the promised security will be manifest."⁸⁰

In *Campbell v. State*,⁸¹ the supreme court held that the exclusion of a defendant's own alibi testimony, because of noncompliance with the twenty-day notice requirements of Indiana Code section 35-36-4-1, violates Article I, Section 13 of the Indiana Constitution. That provision provides, in pertinent part: "In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . ."⁸² Justice DeBruler noted that Section 13 "places a unique value upon the desire of an individual accused of a crime to speak out personally in the courtroom and state what in his mind constitutes a predicate for his innocence of the charges."⁸³ The court noted that if the State were surprised by the alibi, it could seek a continuance.⁸⁴ The United States Supreme Court reached a different conclusion under the compulsory process clause of the Sixth Amendment in *Taylor v. Illinois*.⁸⁵

Justice Givan dissented in *Campbell*. He believed that a person charged with a crime knows of any alibi he or she might have at the beginning of the case, and that the twenty-

76. *Owings*, 622 N.E.2d at 950-51 (citing *Brady v. State*, 575 N.E.2d 981, 988 (Ind. 1991) ("The Indiana Constitution recognizes that there is something unique and important in requiring face-to-face meeting between the accused and the State's witnesses as they give their trial testimony.")).

77. *Id.* at 952.

78. *Id.* at 953. The court found that generally no right existed for the criminal defendant to be present at a deposition. *Id.* at 951. Nonetheless, an exception to this rule seems to exist if the deposition is to be used as substantive evidence by the state at trial. Criminal defense counsel should object to depositions that may be used later at trial if their clients are unable to attend. Prosecutors who take depositions without defendants present should seek to make a record that the defendant was aware of the deposition and given the opportunity to attend.

79. *Id.* at 953 (DeBruler, J., dissenting).

80. *Id.*

81. 622 N.E.2d 495 (Ind. 1993).

82. IND. CONST. art. I, § 13.

83. *Campbell*, 622 N.E.2d at 498.

84. *Id.*

85. 484 U.S. 400 (1988).

day requirement to provide the state with notice of that alibi does not implicate the defendant's rights.⁸⁶

In *Hadley v. State*,⁸⁷ the court of appeals held that while a misdemeanor defendant is entitled to a jury trial under the Indiana Constitution, a right not enjoyed under the U.S. Constitution,⁸⁸ that right can be waived where the defendant does not make an affirmative request for a jury trial. In contrast, a person charged with a felony has an automatic right to a jury trial unless he or she affirmatively waives that right.⁸⁹ Thus, a misdemeanor defendant's right to a jury trial is not self-executing. Rather, the defendant must affirmatively demand a jury trial pursuant to Indiana Criminal Rule 22, which requires him to do so in writing at least ten days prior to the first scheduled trial date.⁹⁰ Hadley had signed an advisement of rights form, which informed him that his right to a jury trial would be waived unless requested at least ten days prior to the first trial setting.⁹¹ The court of appeals held that Hadley waived his right by failing to make such a request.⁹² The court reached this holding despite the fact that the record was silent as to whether Hadley knew how to read or understood the form.⁹³

IV. CRIMINAL LAW

In two cases, *Helton v. State*⁹⁴ and *Jackson v. State*,⁹⁵ the court of appeals considered the constitutionality of Indiana's criminal gang statute.⁹⁶ In each case the defendants mounted free speech, association and equal protection challenges to the statute under both the federal and state constitutions.⁹⁷ Both the first and fifth districts upheld the statute, and neither court applied an analysis of the state constitutional issues different from their federal counterparts.⁹⁸ Both courts followed the supreme court's admonition in *Price* not to engage in an overbreadth analysis under Article I, Section 9 of the state constitution.⁹⁹ They did, however, narrow the application of the statute to defendants who "actively participate" in a group that requires its members to commit felonies or batteries, who know of the group's criminal activities, and who have the specific intent to further the group's criminal conduct.¹⁰⁰ Both courts noted that the criminal gang statute does not

86. *Campbell*, 622 N.E.2d at 501 (Givan, J., dissenting).

87. 636 N.E.2d 173 (Ind. Ct. App. 1994).

88. See *Blanton v. City of Las Vegas*, 489 U.S. 538 (1989) (no Sixth Amendment right to a jury trial if the possible penalty does not exceed incarceration of six months).

89. *Hadley*, 636 N.E.2d at 175.

90. *Id.*

91. *Id.*

92. *Id.* at 176.

93. *Id.* at 175.

94. 624 N.E.2d 499 (Ind. Ct. App. 1993).

95. 634 N.E.2d 532 (Ind. Ct. App. 1994).

96. IND. CODE § 35-45-9-1 (Supp. 1994).

97. *Helton*, 624 N.E.2d at 504; *Jackson*, 634 N.E.2d at 533.

98. *Helton*, 624 N.E.2d at 515; *Jackson*, 634 N.E.2d at 537.

99. *Helton*, 624 N.E.2d at 507; *Jackson*, 634 N.E.2d at 536.

100. *Helton*, 624 N.E.2d at 508; *Jackson*, 634 N.E.2d at 536.

prohibit the mere association of individuals, nor does it criminalize the status of gang membership.¹⁰¹ In *Helton*, the defendant's conviction was affirmed because evidence existed that he directly participated in battering initiates to the group.¹⁰² In *Jackson*, no evidence was presented that the defendant actually committed a battery or was involved in a crime.¹⁰³ There was evidence, however, that the *Jackson* gang required initiates to commit felony battery as a condition of membership.¹⁰⁴ The court upheld Jackson's conviction because of evidence that he knew about this requirement, was an active participant in the gang, and specifically intended to further and facilitate the substantive criminal conduct of the group.¹⁰⁵

In *Conner v. State*,¹⁰⁶ the supreme court used the unique proportionality requirement contained in Article I, Section 16 of the Indiana Constitution¹⁰⁷ to vacate a six-year sentence for distributing a substance represented to be marijuana. Conner had sold fake marijuana to an informant who turned it over to police. Conner was subsequently arrested and convicted of distributing a non-controlled substance, represented to be a controlled substance, a class C felony under Indiana law.¹⁰⁸ Conner received a six-year prison sentence for this offense. Had he instead sold the same amount of marijuana, he would have only been convicted of a class D felony with a possible maximum prison term of three years.¹⁰⁹ Thus, Conner's sentence was twice as long because he sold fake marijuana rather than the real thing.

The court noted that to subject a person dealing ten pounds of real marijuana to less criminal liability than one who sells one gram of fake marijuana makes little sense.¹¹⁰ The discrepancy offended the court's sense of justice.¹¹¹ The court affirmed the conviction but vacated the sentence and remanded the case instructing the trial court to resentence Conner for not more than three years.¹¹²

As in *Campbell*, the twenty-day alibi notice case, Justice Givan was the lone dissenter in *Conner*.¹¹³ He saw no constitutional violation in what appeared to him to be a legislative determination that selling fraudulent drugs should be penalized more severely than selling actual drugs.¹¹⁴ Justice Givan wrote that the court should have presumed the

101. *Helton*, 624 N.E.2d at 511; *Jackson*, 634 N.E.2d at 535.

102. *Helton*, 624 N.E.2d at 515.

103. *Jackson*, 634 N.E.2d at 534.

104. *Id.*

105. *Id.* at 537.

106. 626 N.E.2d 803 (Ind. 1993).

107. "Excessive bail shall not be required. Excessive fines shall not be imposed. Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense." IND. CONST. art. I, § 16.

108. IND. CODE § 35-48-4-4.6 (1993).

109. IND. CODE § 35-48-4-10(b)(1)(B) (1993) (dealing more than thirty grams of marijuana, a Class D felony); IND. CODE § 35-50-2-7 (1993) (maximum prison term for Class D felony, three years).

110. *Conner*, 626 N.E.2d at 806.

111. *Id.*

112. *Id.*

113. *Id.* (Givan, J., dissenting).

114. *Id.*

statute constitutional and subjected it to rational basis review.¹¹⁵ What is interesting about *Campbell* and *Conner*, and other criminal cases as opposed to civil cases, is that the court is less willing to defer to legislative choices. If in *Campbell* the twenty-day notice provision had been presumed constitutional, and if in *Conner* the increased penalty for the fraudulent sale of drugs had been presumed constitutional, and if the defendants had to negate every conceivable rational basis for the statutes, the statutes most likely would have been upheld. As demonstrated by the cases that follow, the Indiana Supreme Court is much more likely to engage in minimal rationality review in the civil law context.

V. EQUAL PRIVILEGES AND IMMUNITIES

In *Collins v. Day*,¹¹⁶ the court rewrote state equal protection law. In doing so, it rejected a long line of cases interpreting Article I, Section 23 coextensively with the equal protection clause of the Fourteenth Amendment to the United States Constitution.¹¹⁷

Plaintiff Eugene Collins was a farm worker who broke his leg while working on defendant Glen Day's farm. Collins applied for worker's compensation benefits, but Indiana's worker's compensation statute specifically exempts agricultural workers from coverage.¹¹⁸ Collins was denied coverage by the Worker's Compensation Board and the Indiana Court of Appeals. The court concluded that Section 23 was the same as the Equal Protection Clause of the Fourteenth Amendment¹¹⁹ and that the exemption of agricultural workers from the statute was an economic classification, subject to minimal rational basis review scrutiny, which it easily survived. Collins sought transfer arguing that Section 23 was independent of and distinguishable from the Fourteenth Amendment, and that Section 23 imposes greater restrictions on the state's ability to classify citizens based on economic status.

The Indiana Supreme Court acknowledged that its case law has taken varying positions regarding the relationship between Section 23 and the Fourteenth Amendment.¹²⁰ The court reviewed the constitutional debates of 1850-51 and determined that Section 23 was introduced to "prohibit state entanglement in private profit-seeking ventures and to avoid the creation of monopolies."¹²¹ From its early cases, the court distilled a two-part test for Section 23 violations. First, to be permissible, legislative classifications "must be

115. *Id.*

116. 644 N.E.2d 72 (Ind. 1994). The author represented the plaintiff in this case.

117. U.S. CONST. amend. XIV provides: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The corresponding section of the Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 23.

118. See IND. CODE 22-3-2-9(a) (1993).

119. *Collins v. Day*, 604 N.E.2d 647 (Ind. Ct. App. 1992).

120. *Collins*, 644 N.E.2d at 74. Compare *Hammer v. State*, 89 N.E. 850, 852 (1909) (Section 23 "is the antithesis of the Fourteenth Amendment to the federal constitution.") with *Dortch v. Lugar*, 266 N.E.2d 25, 39 (1971) (Section 23 and the Fourteenth Amendment "concern the abridging of privileges and immunities of citizens and protect substantially identical rights.").

121. *Collins*, 644 N.E.2d at 76.

based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics.”¹²² Second, “any privileged classification must be open to any and all persons who share the inherent characteristics which distinguish and justify the classification, with special treatment accorded to any particular classification extended equally to all such persons.”¹²³

If the court’s analysis had ended with the construction of this two-part standard, some progress would have been made in equality law in Indiana. Unfortunately, the court overlaid this test with its common theme that “courts must accord considerable deference” to the legislature, must presume every statute to be constitutional, and must require the challenger “to negative every conceivable basis which might have supported the classification.”¹²⁴ Further, “the question of classification under Section 23 is primarily a legislative question,” and only subject to judicial review “where the lines drawn appear arbitrary or manifestly unreasonable.”¹²⁵ This form of rational basis review provides little protection against legislative grants of unequal privileges and immunities.

The court specifically rejected the idea of establishing varying degrees of scrutiny for different protected interests.¹²⁶ In other words, the Indiana Supreme Court foreclosed future application of strict scrutiny review of infringements of fundamental rights or classifications based on suspect classifications, such as those based upon race or religion. After *Collins*, Section 23 provides substantially less protection than its federal counterpart.

VI. SPECIAL OR LOCAL LEGISLATION

The Indiana Constitution contains several provisions that have no federal analogues. One such provision is the requirement that all laws shall be general and must have uniform application throughout the state.¹²⁷

In *Indiana Gaming Commission v. Moseley*,¹²⁸ the Indiana Supreme Court again demonstrated considerable deference to the legislature by rejecting state constitutional

122. *Id.* at 79.

123. *Id.*

124. *Id.* The court speculated that the legislature could have had several reasonable bases for its exclusion of agricultural workers, including

the prevalence of sole proprietorships and small employment units, including numerous family operations; the distinctive nature of farm work, its attendant risks, and the typical level of worker training and experience; the traditional informality of the agricultural employment relationship and the frequent ancillary employee benefit programs; and the peculiar difficulties employers experience in passing along the additional cost of worker’s compensation insurance to the consumer.

Id. at 81.

125. *Id.* at 79 (citations omitted).

126. *Id.*

127. “In all cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.” IND. CONST. art. IV, § 23.

128. 643 N.E.2d 296 (Ind. 1994).

challenges to the Indiana General Assembly's decision to limit riverboat gambling to certain geographic areas in the state and to delegate to local referenda the question of whether riverboat casinos would be licensed at all. The Porter Superior Court declared the riverboat gambling statute unconstitutional under Article IV, Section 23 of the Indiana Constitution but rejected a challenge to it premised on Article I, Section 23¹²⁹ of the state constitution.¹³⁰

Four Portage residents sued, claiming that the riverboat gambling law was not general but rather special legislation in violation of Article IV, Section 23.¹³¹ Their claim was premised on the referenda scheme authorizing riverboat casinos in Lake County based only on city-wide referenda, but requiring county-wide referenda in Porter and other counties.¹³² The plaintiffs claimed this was special legislation favoring the residents of Lake County cities and disadvantaging the Portage residents in Porter County.¹³³ They argued that if Portage had been treated like Gary, it too would have been eligible for a riverboat license.¹³⁴

The court first noted that one of the primary purposes of the constitutional convention of 1850-51, and the genesis of Article IV, Section 23, was to prohibit the legislature from enacting special or local legislation.¹³⁵ The court candidly admitted that it had "struggled since 1851 to articulate a consistent basis for determining when a law is special, and when its subject could be addressed through a general law."¹³⁶ That struggle continues in this case.

The court reaffirmed its position that Article IV, Section 23 questions are justiciable.¹³⁷ But its "high degree of deference to the legislature on [Section] 23 questions"¹³⁸ make that justiciability fairly meaningless. In upholding the legislation the court made some highly questionable factual assumptions. First, it concluded that "[i]t is apparent that the legislature's decision to permit casino gambling only on riverboats has the effect of rendering most Indiana counties unable to participate."¹³⁹ Also, the court assumed that the legislature

identified the universe of Indiana counties suitable to host riverboat gambling. Limiting the locations of riverboats to the specified counties naturally flows

129. See *supra* notes 116-26 and accompanying text.

130. *Moseley*, 643 N.E.2d at 297.

131. *Id.* at 298.

132. *Id.*

133. *Id.*

134. Voters in Gary, East Chicago and Hammond in Lake County voted for gambling, as did voters in LaPorte County, where voting was conducted on a county-wide basis. Voters in Portage in Porter County voted for gambling, but Porter County as a whole voted against gambling. *Id.*

135. *Id.* at 299. Immediately prior to the 1850 constitutional convention the legislature spent up to 90% of its time dealing with individual cases and local legislation including everything from granting divorces to providing for local roads, streets and alleys. *Id.*

136. *Id.* at 300.

137. *Id.*

138. *Id.*

139. *Id.* at 301.

from [the] fact that not every county is home to a suitable body of water. It is inherent in the riverboat decision to [issue] permit[s] [only to] riverboats. We conclude that riverboat gambling is not subject to uniform law of general applicability.¹⁴⁰

The actual universe of suitable counties is substantially larger given that riverboat casinos would not necessarily have to undock from port and thus do not need to be restricted to navigable bodies of water. Many ports along the Wabash, White and other rivers and lakes in the state are just as suitable. The real factor in the legislature's decision to limit riverboat gambling to certain geographic areas was the political influence of key legislators, not the navigability of the bodies of water.

The court can be excused for ignoring this political reality because it was never at issue. The plaintiffs did not seek to strike down the legislation nor to expand its operation to cities other than Portage. They were entrepreneurs disappointed by the county-wide vote in Porter County who merely wanted the same city-only voting scheme allowed in Lake County to be applied in Portage so that they could obtain and benefit from a riverboat gambling license. The plaintiffs only argued that the counties selected by the legislature had to be treated alike.¹⁴¹ In this limited context, the Indiana Supreme Court held that the legislation was constitutional.¹⁴² A broader attack might have been more persuasive; yet given the state's enormous economic interest in sponsoring riverboat casinos, the result would probably have been the same.

The court's analysis of the limited question presented by the plaintiffs is contained in a few sentences in which it speculates on a possible rational basis for the legislature's distinction between Lake and other counties. The court noted:

In Lake County, the whole of the waterfront is covered by substantial cities whose residents have the greatest interest in how the shore is used. In all the other [selected] counties, however, the shore contains both incorporated and unincorporated territory. It thus seems sensible to stage a vote of all persons in the county.¹⁴³

The court's test of constitutionality appears to rest on whether the legislation is "sensible." Yet its actual analysis does not serve as a check upon legislative classifications or local or special legislation.

The court also rejected the plaintiff's Article I, Section 23 challenge but recognized that the provision's original purpose was to prohibit the legislature from granting monopolies or special privileges to private commercial enterprises.¹⁴⁴ While this purpose

140. *Id.*

141. *Id.*

142. *Id.* at 304.

143. *Id.* at 301. This speculative basis for the legislation was not even suggested by the State but rather was raised for the first time at oral argument by Justice DeBruler.

144. The court refused to consider whether Article I, Section 23 should be construed independently from the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It noted that the issue was squarely presented by the *Collins* decision. *Moseley*, 643 N.E.2d at 303. See *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), *supra* notes 116-26 and accompanying text.

is exactly what the riverboat gambling statute was created to achieve, this purpose of the statute was never discussed in the case. Again, the plaintiffs avoided the issue because they wanted to benefit from the statute, not strike it down. In this context, the court reasoned, the historical basis for Section 23 did not apply to a voting scheme by which local people directly determine the allocation of commercial licenses. By *ipse dixit*, the court concluded that such referenda do not bestow benefits or privileges nor impose burdens on those individuals affected by the results. The court did not explain its conclusion nor did it compare the prospective Portage casino licensee with his counterpart in Hammond or East Chicago.¹⁴⁵

Justice Givan was the sole dissenter. He considered the statute to be applied unequally, and refused to accept the majority's assumption that a casino's effect in Lake County would be confined to the cities along the lake front. Justice Givan noted that all residents and taxpayers in a county with a casino would be significantly affected in terms of increased traffic and greater expenditure of county funds for law enforcement. He found no justification in treating the taxpayers of Lake County any differently than taxpayers of other counties in which referenda were authorized.¹⁴⁶

VII. RIGHT TO A REMEDY

In *Shook Heavy and Environmental Construction Group v. City of Kokomo*,¹⁴⁷ the court held that an unsuccessful bidder does not have a cause of action pursuant to a state statute that requires municipalities to award contracts to the lowest responsible and responsive bidder.¹⁴⁸ It also refused to create such a cause of action under the common law or Article I, Section 12 of the Indiana Constitution.¹⁴⁹

The court first reviewed the statutory framework for public lawsuits challenging public bid procedures. The court held that the statutory causes of action, one limited to taxpayers or citizens of the municipality, the other limited to claims of fraud or collusion, were not applicable.¹⁵⁰ Shook was neither a citizen nor a taxpayer of Kokomo, and did not allege collusion or fraud. Because the legislature created these two specific causes of action, along with an administrative process for the appeal of certain municipal decisions, a process which specifically excluded challenges to public bidding procedures, the court concluded that the legislature intended that there be no other causes of action regarding such public bidding.¹⁵¹

145. The court, relying upon *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68 (1978), also concluded that the voting scheme did not violate the Fourteenth Amendment. *Moseley*, 643 N.E.2d at 304.

146. *Moseley*, 643 N.E.2d at 305.

147. 632 N.E.2d 355 (Ind. 1994).

148. *Id.* at 357. See IND. CODE § 36-1-9-3 (1993).

149. "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." IND. CONST. art. I, § 12.

150. *Shook Heavy*, 632 N.E.2d at 358.

151. *Id.* at 359.

Similarly, the court found no common law right on behalf of an unsuccessful bidder to force a governmental entity to contract with it.¹⁵² It refused to accept Shook's arguments that such a right should be created to protect the sanctity of the competitive bidding process and to insure a level playing field to all potential contractors. Rather, the court, speaking through Justice Sullivan, noted that there were important public policy arguments in favor of denying such a cause of action to unsuccessful bidders.¹⁵³ The court noted the primary interest was the expeditious construction of public works projects. According to Justice Sullivan, "No where is time money more than in the construction field."¹⁵⁴

The court also rejected Shook's argument for a cause of action based upon Article I, Section 12 of the Indiana Constitution. This issue, though not briefed, was raised at oral argument and the court declined to give it extensive treatment.¹⁵⁵ Nevertheless it took the opportunity to engraft federal due process law onto Article I, Section 12, and provided that to maintain a cause of action for injury to property, a person must allege some injury to a "protected property interest."¹⁵⁶ The court followed federal law in concluding that property interests are not created by procedural rules, but instead must be "derived from statute, legal rule or mutually explicit understanding and stemming from a source independent of the Constitution such as state law."¹⁵⁷ Because no statutory or common law cause of action existed, the court determined that Shook had no entitlement to the contract, and therefore was not deprived of a constitutionally protected property interest by the city's failure to award it the bid.

In *Indiana Department of Environmental Mgmt. v. Chemical Waste Management, Inc.*,¹⁵⁸ the court upheld Indiana's "good character" law¹⁵⁹ against a variety of challenges brought by a hazardous waste disposal company. The statute essentially allows the Commissioner of the Indiana Department of Environmental Management (IDEM) to deny hazardous waste disposal permits to companies that have paid \$10,000 or more to settle civil, criminal or administrative complaints against them in other states that alleged a violation of an environmental law. The Marion Superior Court enjoined the Commissioner from applying the statute to Chemical Waste's application for a permit to construct a hazardous waste disposal site in Allen County. IDEM appealed. The Indiana Supreme Court held that the case was not ripe for review because the solid waste management board had not promulgated rules governing review of the Commissioner's denial of permit applications.¹⁶⁰ Nevertheless, the court noted, although Article III of the U.S. Constitution limits federal courts from issuing advisory opinions, no such

152. *Id.* at 359-60.

153. *Id.* at 359.

154. *Id.*

155. *Id.* at 360.

156. *Id.* at 361.

157. *Id.* (quoting *Rice v. Scott County Sch. Dist.*, 526 N.E.2d 1193, 1196-97 (Ind. Ct. App. 1988) (citing, *inter alia*: *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 602 (1972))).

158. 643 N.E.2d 331 (Ind. 1994).

159. See IND. CODE 13-7-10.2 (1993 & Supp. 1994).

160. *Chemical Waste*, 643 N.E.2d at 337.

constitutional restriction exists in Indiana. It therefore chose to provide the Commissioner guidance in applying the statute in the future.¹⁶¹

The court first rejected Chemical Waste's argument that the statute violates equal protection and privileges and immunities principles because it distinguishes between non-commercial and commercial waste disposal facilities.¹⁶² The court determined that the statute did not implicate fundamental rights or suspect classifications and therefore was subject to rational basis review rather than strict or middle level scrutiny under the Fourteenth Amendment.¹⁶³ The court recognized that statutes rarely survive strict scrutiny and rarely fail the rational basis test.¹⁶⁴ In upholding the distinction the court reasoned that "the General Assembly has decided to concentrate the State's energies on regulating commercial waste disposal facilities and it is not our job to second guess such decisions."¹⁶⁵

The court relied upon its recent decision in *Collins v. Day* to reject the Article I, Section 23 challenge to the statute.¹⁶⁶ It found that the disparate treatment accorded commercial waste facilities was reasonably related to inherent characteristics that distinguished them from non-commercial facilities and that the preferential treatment accorded non-commercial facilities was uniformly and equally available to all such facilities. It also found Chemical Waste did not "negate every conceivable basis upon which might have supported the classification."¹⁶⁷

The court also concluded that the statute was not impermissibly vague and did not deny due process by its lack of a hearing prior to a ruling on the permit application. Nor did the lack of promulgated rules, which had been assumed by the statute, implicate due process or equal protection concerns.¹⁶⁸ Similarly, the court found that the statute did not impair contractual obligations nor impose an ex post facto law.¹⁶⁹ Additionally, the court found that the statute does not interfere with freedom of expression or associational interests on its face and that a challenge to the statute as applied was not yet ripe.¹⁷⁰ The broad delegation of authority given by the legislature to IDEM and the limited standards to guide the agency's discretion did not constitute an impermissible delegation of authority since the statute provided the Commissioner with reasons for denying a permit and the discretion to grant permits if mitigating factors are present. While this framework was "far from perfect," it seemed to the court to be adequate.¹⁷¹

161. *Id.* The court noted that the Indiana Constitution does not contain a "cases and controversies" limitation on the court's jurisdiction as does Article III of the United States Constitution, but the state constitution's separation of power language in Article III, § 1 fulfills an analogous function. *Id.* at 336-37.

162. *Id.* at 337 (citing IND. CODE § 13-7-10.2-1 (Burns Supp. 1993)).

163. *Id.* at 338.

164. *Id.* at 337.

165. *Id.* at 338.

166. *Id.* See *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), *supra* notes 116-26 and accompanying text.

167. *Id.* (quoting *Johnson v. St. Vincent Hosp.*, 404 N.E.2d 585, 597 (1980)).

168. *Id.* at 339.

169. *Id.* at 339-40.

170. *Id.* at 340.

171. *Id.*

The court also rejected a challenge based upon Article I, Section 25 of the Indiana Constitution.¹⁷² The court noted that the statute authorized but did not require IDEM to deny permits based upon alleged environmental violations committed in other jurisdictions. It held that Article I, Section 25 controls only the Indiana General Assembly and not the Executive, and is concerned with how laws take effect. It considered the good character statute as analogous to habitual offender enhancement statutes which permit the courts to consider convictions of other jurisdictions that impose sentences in Indiana.¹⁷³

Because of the procedural posture, the court declined to decide whether reputation is a fundamental interest protected by Article I, Section 12.¹⁷⁴ The court observed that a natural person has a more significant interest in his reputation than a waste management company. Such a right seems fundamental based upon its explicit reference in our constitution, but its nature and scope awaits another day.¹⁷⁵

The court was concerned that the statute appeared to authorize IDEM to deny permits based solely on complaints in other jurisdictions. They found this portion of the statute in violation of Article I, Section 1 of the state constitution.¹⁷⁶ The court found that interfering with business or imposing unnecessary restrictions upon lawful occupations based on unsubstantiated allegations violates the fundamental rights contained in Article I, Section 1. The court thus construed the statute to avoid this unconstitutional result by precluding unsubstantiated complaints as grounds for the denial of permits.¹⁷⁷ The court imposed a requirement on the Commissioner to make specific findings that environmental violations had actually occurred prior to using the charges as a basis to justify the denial of a permit.¹⁷⁸

Perhaps the most important state constitutional principle emanating from *Chemical Waste* is the court's limitation of the state's police power based upon Article I, Section 1. The right to pursue an occupation remains vital in Indiana.

172. *Id.* at 341. Article I, § 25 provides: "No law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." IND. CONST. art. I, § 25.

173. *Chemical Waste*, 643 N.E.2d at 341 (citing IND. CODE § 35-50-2-8 (Burns 1994)).

174. *Id.* at 337-38 (relying upon Article I, § 12 of the Indiana Constitution, which provides, in pertinent part: "All courts shall be open; and every man, for injury done to him in his person, property, or *reputation*, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay." IND. CONST. art. I, § 12 (emphasis added).).

175. For an excellent discussion of Article I, § 12, see Jerome L. Withered, *Indiana's Constitutional Right to a Remedy by Due Course of the Law*, 37 RES GESTAE, No. X, April 1994, at 456-64.

176. *Chemical Waste*, 643 N.E.2d at 341. Article I, § 1 provides: "WE DECLARE, that all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government." IND. CONST. art. I, § 1. This section essentially constitutionalizes the Declaration of Independence.

177. *Chemical Waste*, 643 N.E.2d at 341.

178. *Id.*

VIII. BANKRUPTCY

The same court that rejected the overbreadth doctrine in *Price*, used it *sub silentio* in answering a certified question from the United States District Court for the Northern District of Indiana. In *In Re Zumbrun*,¹⁷⁹ a debtor filed for Chapter 7 bankruptcy and listed as an asset an individual retirement account (IRA) valued at \$3600.00. Zumbrun contended that this IRA was protected under Indiana law, which then exempted “[a]n interest the judgment debtor has in a pension fund, a retirement fund, an annuity plan, an individual retirement account, or a similar fund, either private or public.”¹⁸⁰ The bankruptcy trustee contended that the exemption statute violated Article I, Section 22 of the Indiana Constitution, which requires the Indiana General Assembly to exempt from “a reasonable amount of property seizure or sale for the payment of any debt or liability.”¹⁸¹ The district court certified the question of whether the statute violated Article I, Section 22 by failing to impose a dollar limitation on the exempted individual retirement account.

Justice Shepard, writing for himself and Justices DeBruler and Givan, never questioned whether \$3600.00, the amount at issue in the case, was a “reasonable amount of property,” enabling the debtor “to enjoy the necessary comforts of life.”¹⁸² Instead, the court struck the statute as unconstitutional because it “exempted an unlimited amount of intangible assets from execution to pay legitimate debts, making it possible to closet virtually every liquid asset possessed by a debtor simply through placing the assets in some form of retirement instrument.”¹⁸³ This certainly has the appearance of an overbreadth analysis since the court failed “to limit itself to vindicating the rights of the [parties] before it,” and was instead “speculating about hypothetical applications.”¹⁸⁴

Justices Dickson and Sullivan dissented, complaining that a fair reading of Section 22 does not require the legislature to limit the amount of property exempt from a creditor’s claim, but rather mandates it to exempt *at least* a reasonable amount of property from collection.¹⁸⁵

CONCLUSION

There is a trend in Indiana, as elsewhere, for litigants to rely upon the state constitution as a source of independent rights. The Indiana Constitution is an expansive document that on its face provides broader protection for individual rights than does its federal counterpart. Indiana courts are serious about creating independent state

179. 626 N.E.2d 452 (Ind. 1993).

180. See IND. CODE ANN. § 34-2-28-1(a)(6) (West Supp. 1991). This statute was amended in 1993 to exempt only certain types and amounts of such funds. See 1993 Ind. Acts 4069.

181. Article I, Section 22 of the Indiana Constitution provides:

The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted; and there shall be no imprisonment for debt, except in case of fraud.

182. IND. CONST. art. I, § 22.

183. *Zumbrun*, 626 N.E.2d at 455.

184. *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993). See *supra* notes 15-30 and accompanying text.

185. *Zumbrun*, 626 N.E.2d at 455 (Dickson, J., dissenting); *id.* at 456 (Sullivan, J., dissenting).

constitutional doctrine when fairly presented with a state constitutional argument. This past year saw a significant increase in the number of reported decisions applying state constitutional analysis. The developing doctrine is in significant flux as our state courts shake off the vestiges of federal constitutional jurisprudence and search for a unique vision of the Indiana Constitution. While it is too early to definitely characterize that vision, the doctrine being created generally reflects our current state judiciary, which is highly deferential to the legislative and executive branches, especially in civil matters. Only time and experience will reveal whether the rediscovery of the Indiana Constitution will substantially enhance the individual rights of Hoosiers.

1994 DEVELOPMENTS IN INDIANA TAXATION

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INTRODUCTION

It was business as usual in the Indiana tax arena during 1994. The Indiana Tax Court continued its role as the ultimate arbiter of Indiana tax cases, rendering forty-one published opinions during 1994 on a wide variety of issues. The Indiana Supreme Court, by contrast, issued only two opinions on Indiana tax. Subjects addressed by the Indiana Tax Court ranged from the constitutionality of Indiana's "drug tax" to routine property, income, and sales tax cases. This Article highlights the more significant 1994 Indiana tax decisions.

I. CONTROLLED SUBSTANCES EXCISE TAX

As part of the war on drugs, and as a means of revenue enhancement as well, Indiana enacted a tax on the delivery, possession, and manufacture of controlled substances outlawed by Indiana's criminal code.¹ The Drug Tax applies when a person receives delivery of, takes possession of, or manufacturers a controlled substance in violation of state or federal drug laws.² The amount of the tax imposed is based upon the weight and class of the drug,³ and a penalty of 100% is imposed for failure to pay the tax.⁴

During the Survey period, several individuals who were assessed the Drug Tax challenged the statute in the Indiana Tax Court. Those with criminal convictions for their involvement with the particular drug met with success, while those without such convictions did not.

The leading case, *Cliff v. Indiana Department of State Revenue*,⁵ contains the tax court's fullest discussion of the issue. In *Cliff*, a husband and wife were arrested for possession of 927 grams of marijuana. Law enforcement authorities shared this information with the Department of Revenue, which assessed a Drug Tax of \$37,080, a nonpayment penalty of \$37,080, and a 10% collection fee of \$3708 upon the Cliffs.⁶

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1. IND. CODE § 6-7-3-5 (Supp. 1994). The Controlled Substance Excise Tax took effect July 1, 1992. For simplicity, this Article will refer to the tax as the "Drug Tax." Proceeds from the Drug Tax go to drug abuse prevention and criminal investigation. IND. CODE § 6-7-3-16 (1993).

2. IND. CODE § 6-7-3-8 (Supp. 1994).

3. *Id.* § 6-7-3-6.

4. *Id.* § 6-7-3-11(a).

5. 641 N.E.2d 682 (Ind. T.C. 1994).

6. The collection fee is authorized by IND. CODE § 6-8.1-8-2(b) (Supp. 1994).

On the criminal side, Mrs. Clifft pleaded guilty to possession of drugs as a class A misdemeanor and received a six month driver's license suspension and a one-year sentence of incarceration with all but two days suspended. The charges against Mr. Clifft, however, were dropped (much to his later misfortune).

On the tax side, the Cliffsts challenged the Drug Tax under the Fifth Amendment (self-incrimination and double jeopardy), and the Fourteenth Amendment (equal protection and due process) of the United States Constitution. The Cliffsts raised similar claims for the parallel Indiana constitutional provisions, but failed to develop them, and as a result, the Indiana provisions were not at issue in the court's opinion.⁷

Judge Fisher began by noting the taxpayer's "difficult burden" of challenging the constitutionality of the tax.⁸ He explained that the taxpayers must "rebut the strong presumption that statutes are constitutional."⁹ He then addressed the Clifft's arguments seriatim.

First, Judge Fisher rejected the self-incrimination argument. "It is well settled," he wrote, "that, standing alone, the illegality of an activity, such as the unauthorized possession of marijuana or other controlled substances, does not preclude taxation of the activity."¹⁰ To be unconstitutional in this context, the imposition and collection methods must "create 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination."¹¹

The Indiana Drug Tax, however, has an express provision prohibiting the Department from requiring taxpayers to reveal their identity. The statute provides that "[a] person may not be required to reveal the person's identity at the time the tax is paid."¹² Interpreting this language, Judge Fisher reasoned that the taxpayer could send an agent to pay the tax, and the statute would not otherwise require disclosure of the name, address, phone number, social security number, or any other identifying information for such individual. According to the court, the Drug Tax thus does not require any person to give self-incriminating evidence.¹³

Moreover, the Drug Tax statute prohibits the use of confidential information acquired by the Department "to initiate or facilitate prosecution for an offense."¹⁴ The court reasoned that even if the Drug Tax did compel self-incrimination, it essentially granted use immunity and derivative use immunity, thus removing any Fifth Amendment self-incrimination problems.¹⁵

7. *Clifft*, 641 N.E.2d at 684 n.2.

8. *Id.* at 685.

9. *Id.* (citing *State Line Elevators, Inc. v. State Bd. of Tax Comm'rs*, 528 N.E.2d 501, 503 (Ind. T.C. 1988)).

10. *Id.* (citing *Department of Revenue v. Kurth Ranch* 114 S. Ct. 1937 (1994)).

11. *Id.* (citing *Marchetti v. United States*, 390 U.S. 39, 44 (1968)).

12. IND. CODE § 6-7-3-8 (Supp. 1994).

13. *Clifft*, 641 N.E.2d at 687.

14. IND. CODE § 6-7-3-9 (Supp. 1994).

15. *Clifft*, 641 N.E.2d at 689.

The tax court then easily rejected the Cliffsts' equal protection argument, noting that people who "possess controlled substances are not a suspect class," and as a result, Judge Fisher found no equal protection violation.¹⁶

The Cliffsts next argued that the Drug Tax violates due process by allowing a jeopardy assessment to be immediately imposed without notice or a hearing. The tax court appropriately side-stepped this argument, noting that the Cliffsts had received notice and a hearing, and that the Department had not taken any measures to collect on the jeopardy assessment. In any event, Judge Fisher noted that an injunction can be sought in the tax court to challenge a jeopardy assessment, and this remedy satisfies due process.¹⁷

Finally, the Cliffsts challenged the Drug Tax on double jeopardy grounds, asserting that the Drug Tax, like the related criminal charges, constituted punishment. On this front the Indiana Tax Court agreed. Relying on *Department of Revenue of Montana v. Kurth Ranch*,¹⁸ a similar case from the United States Supreme Court invalidating Montana's drug tax, Judge Fisher held that Indiana's Drug Tax violates the Fifth Amendment's prohibition against double jeopardy.

Judge Fisher observed that in *Kurth Ranch*, the Supreme Court found the Montana drug tax to be a second punishment because: (1) the tax had a criminal deterrent purpose; (2) the tax rate was very high; (3) the tax was conditioned upon the commission of a crime; (4) the tax was not assessed until arrest; and (5) the tax could be imposed even after the drug had been confiscated.¹⁹ Judge Fisher noted that Indiana's Drug Tax is very similar to Montana's. The only difference is that arrest is not a predicate to imposition of the Indiana Drug Tax. Accordingly, Judge Fisher viewed *Kurth Ranch* as controlling, and held that the Indiana Drug Tax is a punishment that "must be imposed during the first prosecution or not at all."²⁰

Because Mrs. Clifft had been prosecuted and convicted, she was thus immune from the Indiana Drug Tax.²¹ Mr. Clifft, however, won the battle but lost the war. Because jeopardy had not attached in any criminal action against him, double jeopardy did not bar collection of the tax from him.²²

In three related cases in which opinions were issued the same day, the tax court applied *Clifft* to other assessments of the Indiana Drug Tax. In *Bailey v. Indiana Department of State Revenue*,²³ a taxpayer was convicted of possession of a ten-pound brick of marijuana and was sentenced to two years' imprisonment. The Department of Revenue subsequently assessed a combined Drug Tax and penalty of \$356,400. The taxpayer was relieved of this obligation due to the *Clifft* holding.

16. *Id.* at 689-90.

17. *Id.* at 690-91.

18. 114 S. Ct. 1937 (1994).

19. *Clifft*, 641 N.E.2d at 691-92 (discussing the *Kurth Ranch* analysis).

20. *Id.* at 693 (quoting *Kurth Ranch*, 114 S. Ct. at 1948).

21. *Id.* ("[T]he Department may not collect the tax from Mrs. Clifft, who has already pled guilty to Class A misdemeanor possession.").

22. *Id.* at 693-94.

23. 641 N.E.2d 695 (Ind. T.C. 1994).

Similarly, in *Hayse v. Indiana Department of State Revenue*,²⁴ a taxpayer was spared a \$391,393 Drug Tax assessment because of his related conviction for cultivation of marijuana. Finally, in *Hall v. Department of Revenue*,²⁵ married taxpayers were assessed a \$5.6 million Drug Tax for possessing 300 pounds of marijuana. Although the husband was relieved of the obligation due to a related conviction, Mrs. Hall was not prosecuted, and under *Clift*, she thus remained liable for the entire tax.

The tax issue in *Clift*—widely watched among the criminal defense bar as well as the tax bar—is a substantial blow to the State's efforts to collect revenue from and deter drug activities. The Department of Revenue has filed a petition for review in the Indiana Supreme Court, so the issue is not yet completely determined.

In any event, the State remains free to simply enhance its sentencing and penalty levels for drug crimes through legislative amendments. Why it did not pursue that avenue in the first place is unclear.

For those representing individuals accused of illegal drug possession, delivery, or manufacture, *Clift* requires a careful analysis of the potential benefits and burdens of pursuing the criminal prosecution to jeopardy. As *Clift* and its related cases demonstrate, the potential penalty under the Drug Tax will typically be substantially more than any penalty in the criminal system. If the anticipated period of incarceration and the underlying criminal conviction are manageable for the client, the criminal route may be the preferred route.

II. SALES TAX

Several decisions were issued in the sales tax area and are summarized below.

A. Statute of Limitations

In *K&I Asphalt, Inc. v. Indiana Department of State Revenue*,²⁶ the issue was whether the taxpayer's claim for refund was timely filed within the three year limitation period of section 6-8.1-9-1(a) of the Indiana Code. The tax court held that regardless of whether the sales tax is paid directly to the vendor or the Department, a claim for refund of such tax can be filed within three years of the end of the calendar year for which the return was filed.

B. Responsible Officer

In *Safayan v. Indiana Department of State Revenue*,²⁷ the Department attempted to collect a corporation's sales and withholding taxes from a 51% shareholder and president of a closely held corporation. In general, a corporate president is presumed to be liable for payment of taxes.²⁸ Because the president did not actively manage the corporation—indeed she lacked authority to sign checks, disburse funds, hire employees,

24. 641 N.E.2d 698 (Ind. T.C. 1994).

25. 641 N.E.2d 694 (Ind. T.C. 1994).

26. 638 N.E.2d 901 (Ind. T.C. 1994).

27. 631 N.E.2d 25 (Ind. T.C. 1994).

28. *Id.* at 28 (citing *State v. Hogo, Inc.*, 550 N.E.2d 1320, 1324 (Ind. Ct. App. 1990)).

or pay taxes—the tax court held that she was not responsible for the corporate tax obligations.

C. Governmental Entity Exemption

In *National Serv-All v. Indiana Department of State Revenue*,²⁹ a for-profit waste hauler claimed an exemption from sales taxation as a governmental agency or entity.³⁰ The tax court denied the exemption, reasoning that the for-profit hauler had no statutory creation and no other governmental connection other than hauling under contract for a municipality for profit.³¹

D. Meaning of "Retail Transaction"

In *3551 Lafayette Road Corp. v. Indiana Department of State Revenue*,³² the issue was whether sales tax could be assessed on a strip club's tokens sold to patrons where the tokens were then exchanged for "table dances." The case turned on whether the patrons were involved in a "retail transaction," since the gross retail tax (more commonly known as the sales tax) only applies to "retail transactions."³³ A retail transaction, in turn, arises when "tangible personal property [is] acquired for the purpose of resale and [is] transferred to another person for consideration."³⁴ The provision of services, by contrast, generally does not qualify as a retail transaction subject to sales tax.³⁵

The tax court ruled for the night club, reasoning that the table dances were a service. The court also rejected the Department of Revenue's argument that the VIP rooms, where table dances occurred, were "rented" within the meaning of a separate statutory provision that imposes sales tax on room rental for adult dancing.³⁶

III. INCOME TAX

Of the income tax decisions during 1994, the following are noteworthy.

A. Amended Return As Claim For Refund

In *UACC Midwest, Inc. v. Indiana Department of State Revenue*,³⁷ the taxpayer timely filed Indiana gross income tax returns for the years 1986 through 1990. The taxpayer subsequently filed amended returns with explanatory statements seeking a reduction in tax, but did not file the Department's Form 615 for refund claims. The

29. 644 N.E.2d 954 (Ind. T.C. 1994).

30. See IND. CODE § 6-2.5-5-16(1) (Supp. 1994).

31. *National Serv-All*, 644 N.E.2d at 959-60.

32. 644 N.E.2d 199 (Ind. T.C. 1994).

33. See IND. CODE § 6-2.5-2-1(a) (Supp. 1994).

34. *3551 Lafayette Road Corp.*, 644 N.E.2d at 200 (quoting *Maurer v. Indiana Dep't of State Revenue*, 607 N.E.2d 985, 987 (Ind. T.C. 1993)).

35. *Id.* (citing IND. CODE § 6-2.5-4-1(e)(1) (1994); IND. ADMIN. CODE tit. 45, r. 2.2-4-2 (1992)).

36. *Id.* at 201; see IND. CODE § 6-2.5-4-4(a) (Supp. 1994).

37. 629 N.E.2d 1295 (Ind. T.C. 1994).

Department denied refunds on the grounds that no claim for refund had been filed, and the taxpayer appealed to the Indiana Tax Court.³⁸

The court ruled in part for the taxpayer, explaining that the amended returns that were timely filed within three years of the latter of the due date of the return or the date of payment qualified as claims for refund.³⁹ The court reasoned that the explanatory statements attached by the taxpayer provided all of the information required by the Department for claims for refund.⁴⁰

It is preferable, of course, for taxpayers to use the forms prescribed by the taxing authorities. The Department's regulations specify Form 615 for claims for refunds.⁴¹

B. Situs For Sale Of Federal Tax Benefits

The issue in *Indiana Department of State Revenue v. Bethlehem Steel Corp.*⁴² was whether an out-of-state taxpayer's sale of federal tax benefits relating to an Indiana facility were subject to Indiana gross income tax. Affirming the Indiana Tax Court, a divided Indiana Supreme Court held that Indiana gross income tax did not reach the sale. Focusing on the relationship between the intangible and the "business situs," the Indiana Supreme Court ruled that the sale of the tax benefits was not "integrally related" to the Indiana situs.⁴³

Justices DeBruler and Sullivan dissented in separate opinions. Both Chief Justice Shepard's majority opinion and Justice Sullivan's dissenting opinion are thorough and detailed. If nothing else, *Bethlehem Steel* shows that the Indiana Supreme Court still has at least some interest in Indiana tax issues that come to the Indiana Supreme Court as a matter of discretion and not as a matter of right.⁴⁴

IV. REAL PROPERTY TAXES

As is typical of most Survey periods, the Indiana Tax Court heard several real property tax cases. The most noteworthy are highlighted below.

A. Jurisdiction: Failure To Timely File With All Necessary Entities

To appeal from a final determination of the State Board of Tax Commissioners, within forty-five days, the taxpayer must: (1) file a written notice with the State Board of the taxpayer's intent to appeal; (2) file a complaint in the Indiana Tax Court; and (3) serve the Indiana Attorney General and the county assessor with a copy of the complaint.⁴⁵ In *Indiana Model Co. v. State Board of Tax Commissioners*,⁴⁶ the taxpayer

38. *Id.* at 1297-98.

39. *Id.* at 1298-99; see IND. CODE § 6-8.1-9-1(a)(1), -(2) (Supp. 1994).

40. *UACC Midwest, Inc.*, 629 N.E.2d at 1299.

41. IND. ADMIN. CODE tit. 45, r. 15-9-2 (1994).

42. 639 N.E.2d 264 (Ind. 1994).

43. *Id.* at 271-72.

44. See IND. APP. R. 18.

45. IND. CODE § 6-1.1-15-5(c)(1)-(3) (Supp. 1994).

46. 639 N.E.2d 695 (Ind. T.C. 1994).

sent all copies to the the Indiana Tax Court Clerk to be sent to the above entities. The Clerk did so eight days later.

The tax court did not take issue with this manner of filing and service.⁴⁷ Unfortunately for the taxpayer, however, the clerk's mailing occurred after the mandatory time limits. As a result, the tax court lacked jurisdiction, and the appeal was dismissed. The decision serves as a painful reminder that the tax court's jurisdictional statutes must be scrupulously followed.⁴⁸

B. Inability To Increase Assessment Without Proper Notice

In *Mills v. State Board of Tax Commissioners*,⁴⁹ the County Board of Review issued a final determination, and later issued a subsequent determination increasing the assessment without notice. The tax court, applying Indiana Code section 6-1.1-13-1, held that the subsequent increase was invalid for lack of notice.⁵⁰

C. Economic Obsolescence

In *Simmons v. State Board of Tax Commissioners*,⁵¹ a pro se taxpayer appealed the State Board's assessment of an apartment building in Indianapolis, arguing that the State Board should have made an adjustment for economic obsolescence.⁵² The tax court reversed and remanded, holding that the plight of the surrounding neighborhood should have been considered in determining economic obsolescence. Indeed, one of the Board's regulations listed the following items as causes of economic obsolescence: (1) "[l]ocation of structure [inappropriate] for its neighborhood," and (2) "[a] neighborhood that is in transition of use."⁵³ As a result, the court concluded that "[b]ecause a commercial improvement's neighborhood can cause economic loss (i.e. economic obsolescence), it is simply contrary to its own regulations for the State Board to assert that a neighborhood may not affect a commercial building's depreciation."⁵⁴

V. PERSONAL PROPERTY TAX

A. Penalties

For taxpayers who undervalue their personal property on their tax returns by more than 5%, Indiana Code section 6-1.1-37-7(e) prescribes a 20% penalty of the additional taxes finally determined. In *Dav-Con, Inc. v. State Board of Tax Commissioners*,⁵⁵ the tax court affirmed the imposition of this 20% penalty if the undervaluation exceeded 5% as

47. *Id.* at 698 n.4 ("The court is not so much concerned with *who* mails the documents, but rather that the documents are mailed *within the prescribed time period*.").

48. See also *Coachmen Vans v. State Bd. of Tax Comm'rs*, 639 N.E.2d 1066 (Ind. T.C. 1994) (appeal dismissed for failure to serve county assessor as required by IND. CODE § 6-1.1-15-5 (Supp. 1994)).

49. 639 N.E.2d 698, 700 (Ind. T.C. 1994).

50. *Id.* at 703-04.

51. 642 N.E.2d 559 (Ind. T.C. 1994).

52. *Id.* at 560.

53. *Id.* at 561; see IND. ADMIN. CODE tit. 50, r. 2.1-5-1 (1992).

54. *Simmons*, 642 N.E.2d at 561.

55. 644 N.E.2d 192 (Ind. T.C. 1994).

determined on remand. Judge Fisher noted that the “penalty is mandatory and offers no opportunity for discretion when ‘the facts meet the requirements of the statute.’”⁵⁶

B. Bailee’s Possession

In *Mid-America Mailers v. State Board of Tax Commissioners*,⁵⁷ a company in the business of mailing advertisements, fund-raising requests, and solicitations was assessed business personal property tax for printed materials that it possessed but did not own. The tax court affirmed the assessment, reasoning that the printed materials were “held, used, or consumed in connection with the production of income” as set forth in Indiana Code section 6-1.1-1-11(6)(ii), which defines personal property.⁵⁸ Further, Indiana Code section 6-1.1-2-4(b) imposes liability on any person “holding, possessing, controlling, or occupying any tangible property on the assessment date.”⁵⁹

Under this statutory scheme, the Board may tax “either the owner or the possessor unless the possessor can prove the owner is being taxed, or the owner has accepted liability for the tax under contract.”⁶⁰ Thus, the fact that Mid-America did not own the property and was a mere bailee presented no defense to the inventory tax.

VI. MISCELLANEOUS

Finally, several miscellaneous decisions were decided that merit brief mention:

A. Intangibles Tax

The tax court held that intangibles tax liability, incurred prior to the effective repeal date of the tax, November 10, 1988, could not be avoided.⁶¹

B. Inter-Agency Comity

The tax court held that where Indiana law granted the Indiana Department of Environmental Management (IDEM) the authority to grant property tax deductions for resource recovery systems, the State Board of Tax Commissioners was powerless to disturb IDEM’s decision.⁶²

56. *Id.* at 198 (quoting *Gulf Stream Coach, Inc. v. State Bd. of Tax Comm’rs.*, 519 N.E.2d 238, 243 (Ind. T.C. 1988)).

57. 639 N.E.2d 380 (Ind. T.C. 1994).

58. *Id.* at 384.

59. *Id.*

60. *Id.* (quoting *State Bd. of Tax Comm’rs. v. Jewell Grain Co.*, 556 N.E.2d 920, 922 (Ind. T.C. 1990) (emphasis added)).

61. *Kenny Kent Chevrolet Co. v. Indiana Dep’t of State Revenue*, 627 N.E.2d 890 (Ind. T.C. 1994). The court relied upon IND. CODE § 1-1-5-1 (Supp. 1994), which states that the “repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing statute shall so expressly provide.”

62. *Auburn Foundry v. State Bd. of Tax Comm’rs.*, 628 N.E.2d 1260 (Ind. T.C. 1994).

SURVEY OF TORT LAW DEVELOPMENTS IN 1994: THE GOOD, THE BAD AND THE UGLY

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As has been the trend for the past several years, a great deal of change occurred during the 1994 Survey period in Indiana's tort law. Much of that change involved expanding existing areas of tort law and recognizing new causes of action. Application of the Tort Claims Act¹ and its immunities also changed. Finally, a new statute² and a clarification of the meaning of Trial Rule 56³ present some issues practitioners must keep in mind when litigating cases.

I. GOVERNMENTAL LIABILITY

A. *Law Enforcement Immunity*

The past year was not good for governmental entities or their employees attempting to escape civil liability. On October 25, 1993, the Indiana Supreme Court handed down four decisions interpreting section 3(7) of the Indiana Tort Claims Act ("section 3(7)").⁴ The linchpin of these decisions was the case of *Quakenbush v. Lackey*.⁵ In *Quackenbush*, the Indiana Supreme Court essentially repealed section 3(7). This statutory provision provides that: "A governmental entity or employee acting within the scope of his employment is not liable if a loss results from: . . . (7) the adoption and enforcement of

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1. IND. CODE § 34-4-14.5-1 (1993).
2. The Residential Real Estate Sales Disclosure Act, IND. CODE § 24-4.6-2-1 to -13 (1993).
3. IND. R. TRIAL P. 56.
4. IND. CODE § 34-4-16.5-3(7) (1993).

5. 622 N.E.2d 1284 (Ind. 1993). The other decisions were *Belding v. Town of Whiteland*, 622 N.E.2d 1291 (Ind. 1993); *Fries v. Fincher*, 622 N.E.2d 1294 (Ind. 1993); and *Kemezy v. Peters*, 622 N.E.2d 1296 (Ind. 1993). Both *Belding* and *Fries* were also traffic accident cases involving law enforcement officers. In *Belding*, the Indiana Supreme Court reaffirmed the rule of *Quackenbush* that the test for the applicability of law enforcement immunity was whether the police officer owed a private duty to the plaintiff. 622 N.E.2d at 1293. The court in *Fries* concluded that while the officer's duty to enforce the law in responding to a call of illegal activity was subject to law enforcement immunity, the officers simultaneous duty "to use ordinary care under the circumstances while traveling on a public roadway" was not entitled to law enforcement immunity. 622 N.E.2d at 1295 (citing IND. CODE ANN. § 9-21-1-8 (West 1992)). Finally, in *Kemezy* the plaintiff alleged the use of excessive force by a police officer. The court stated that since under Indiana law police officers owe a private duty to refrain from using excessive force in the course of making arrests, law enforcement immunity did not apply to such claims. Further, the court stated that such acts by a police officer may be within the scope of his employment. That determination is fact-sensitive. 622 N.E.2d at 1297-98.

or failure to adopt or enforce a law (including rules and regulations) unless the act of enforcement constitutes false arrest or false imprisonment.”⁶

This statute was first interpreted in the case of *Seymour National Bank v. State*.⁷ In *Seymour*, the court stated that the statute was clear and unambiguous, requiring the court to follow its plain meaning.⁸ Thus the court held that a state trooper involved in a fatal automobile collision during a high speed chase of a criminal suspect was engaged in the enforcement of a law and immune from liability under section 3(7).⁹ On rehearing, the supreme court clarified its opinion but did not change its core finding that “all acts of enforcement save false arrest and imprisonment now render the State immune.”¹⁰ The court excluded from immunity those acts so incompatible with the performance of the duties of law enforcement that they are outside the course and scope of a police officer’s duties.¹¹ The court also rejected plaintiffs’ contentions that having liability insurance coverage waived law enforcement immunity, as well as a claim that the law enforcement immunity statute violates Article I, Section 12 of the Indiana Constitution.¹²

In 1991, the law enforcement immunity provision was re-examined by the Indiana Supreme Court in the case of *Tittle v. Mahan*.¹³ *Tittle* was a consolidated case that arose out of the suicide deaths of two jail detainees. The trial courts and courts of appeals held that jail officials were shielded from claims that they had negligently failed to prevent the suicides under section 3(7).¹⁴ The Indiana Supreme Court found that the acts were not within section 3(7). The court redefined law enforcement immunity by stating that such immunity applies only when the action giving rise to liability was “attendant to effecting the arrest of those who may have broken the law.”¹⁵

In *Quackenbush*, the court stated that its previous decisions relating to section 3(7) had produced an unworkable rule of law.¹⁶ In its analysis, the court traced the common law through the enactment of the Indiana Tort Claims Act to support its conclusion that section 3(7) was intended “to codify the common law as it existed at the time the [Indiana Tort Claims] Act was passed.”¹⁷ The common law provided that “governments and their employees were subject to liability for the breach of private duties owed to individuals but were immune from liability for the breach of public duties owed to the public at large.”¹⁸

6. IND. CODE § 34-4-16.5-3 (1993).

7. 422 N.E.2d 1223 (Ind. 1981), *modified on reh’g*, 428 N.E.2d 203 (Ind. 1981).

8. *Id.* at 1226.

9. *Id.* The court specifically stated that in its view, “an officer engaged in effecting an arrest is enforcing a law.” *Id.*

10. *Id.*

11. *Seymour Nat'l Bank*, 428 N.E.2d at 204.

12. *Id.* at 205.

13. 582 N.E.2d 796 (Ind. 1991).

14. *Id.* at 797-98.

15. *Id.* at 801. *See also City of Wakarusa v. Holdeman*, 582 N.E.2d 802 (Ind. 1991).

16. 622 N.E.2d 1284, 1287 (Ind. 1993).

17. *Id.* at 1290-91.

18. *Id.* at 1291.

The court reversed the lower courts, holding that because the plaintiff alleged breach of private duty, section 3(7) did not provide immunity to the defendants.¹⁹

The authors believe that the court's reliance on the public-private duty distinction is fundamentally flawed and is not supported by the rules of statutory construction nor by precedent.²⁰ The court's statutory interpretation violates the plain meaning of section 3(7). Breaches of public duties necessarily involve only acts of omission. If, for example, the statute provided immunity only for the failure to adopt or enforce laws, rules or regulations, the supreme court's interpretation would be logical on its face, since breaches of public duties almost always involve the failure to prevent occurrences such as crimes, fires, or other damaging acts caused by forces beyond the control of governmental actors.²¹

Justice Givan, joined by Chief Justice Shepard, wrote a brief but accurate dissent.²² Policy reasons militate against providing immunity to law enforcement officers involved in automobile collisions. Granting immunity would, in the view of the majority, "sanction negligent and reckless conduct, and result in hardship to the individual injured by the enforcement."²³ But, as Justice Givan noted, this argument should "be used in the legislature to bring about a change in the language of the statute,"²⁴ and should not be used to change the meaning of a clear and unambiguous statute.²⁵ Moreover, whatever ambiguities exist in section 3(7), for which historical analysis would provide clarification, do not lead to the interpretation reached by the majority of the court.

19. *Id.*

20. In interpreting and reviewing a statute, the supreme court's objective is to determine and effect legislative intent. *Stanek v. State*, 603 N.E.2d 152 (Ind. 1992); *Superior Constr. Co. v. Carr*, 564 N.E.2d 281 (Ind. 1990). Where the statute is susceptible to reasonable and intelligible construction, the court has the duty to construe it so as to give effect and validity to each provision of the statute. *Tinder v. Music Operating, Inc.*, 142 N.E.2d 610 (Ind. 1957). Where the legislature makes a plain provision without making any exceptions, the courts can make none. *French's Lessee v. Spencer*, 62 U.S. 228 (1858).

21. See *infra* note 34 and accompanying text. Ironically, the cases cited by the *Quackenbush* court in footnote 3 illustrate the *inappropriateness*, rather than the appropriateness, of the public-private distinction as the touchstone for the application of immunity. *Quackenbush*, 622 N.E.2d at 1287 n.3. The cases cited therein involving acts of commission, if championed by an even reasonably creative plaintiff's attorney, would likely result in a judicial finding of no immunity if the holding of *Quackenbush* is followed. For example, the court's reference to *Indiana Dep't of Corrections v. Stagg*, 556 N.E.2d 1338 (Ind. Ct. App. 1990), suggests the immunity of the Department of Corrections' investigation of an attorney's activities. Ms. Stagg, however, asserted a claim for defamation, a tort of commission. Because public employees have a private duty to avoid defaming individuals during the course and scope of their employment, how the law enforcement immunity defense would survive the public-private duty analysis is difficult to understand.

22. *Quackenbush*, 622 N.E.2d at 1294.

23. *Id.* at 1290.

24. *Id.* at 1291.

25. *Id.*

B. Notice of Tort Claim

One Indiana Supreme Court decision and two court of appeals decisions helped define the parameters of the 180-day notice of a tort claim. This notice is a prerequisite to bringing an action based in tort against a governmental entity or its employee.

In *South Bend Community Schools v. Widawski*,²⁶ the Indiana Supreme Court held that the status of minority qualifies a claimant as "incapacitated."²⁷ Therefore, the deadline for giving notice of a tort claim is 180 days after the minor reached majority.²⁸

In *Ammerman v. State*,²⁹ the Indiana Court of Appeals concluded that although the plaintiffs had failed to strictly comply with the notice requirements by sending their notice to the Indiana Attorney General rather than the state agency, they had substantially complied with the requirement since the notice would not have served any purpose had it been sent to the state agency. The state agency would not have investigated nor defended against the claim, but would only have forwarded it to the Attorney General.³⁰ In contrast, the court in *Madden v. Erie Insurance Group*³¹ concluded that substantial compliance had not been shown when the plaintiff failed to prove that "the State had received full and timely information regarding the occurrence, as well as formal notification of Erie's intent to assert a claim."³² The court reaffirmed the long-standing principle that actual knowledge of the incident, coupled with a routine investigation by the governmental entity is not substantial compliance; the governmental entity must have actual knowledge that the incident forms the basis of an active claim by the potential plaintiff.³³

C. Private v. Public Duties

In *Quakenbush* and the three other law enforcement immunity cases, the Indiana Supreme Court based its decision on whether government employees owed a public or private duty to individuals. Clear cases of a violation of only a public duty include claims against police, fire, welfare or other public service municipal departments for failure to provide protective or other services.³⁴ Generally, once a defendant can show that the

26. 622 N.E.2d 160 (Ind. 1993).

27. *Id.* at 162.

28. *Id.* at 161-62. Chief Justice Shepard dissented, reasoning that because a former version of the statute that specifically extended the tolling period to minority status was repealed, the General Assembly intended that children be required to file, through their next friend, notice of tort claims within the standard 180-day period. *Id.* at 162.

29. 627 N.E.2d 836 (Ind. Ct. App. 1994).

30. *Id.* at 839-40. This result is an extension of the Indiana Supreme Court's ruling in *Indiana State Highway Comm'n v. Morris*, which found substantial compliance where the highway commission was served with a tort claim notice and in turn gave the notice to the Attorney General within the 180-day period. 528 N.E.2d 468 (Ind. 1988).

31. 634 N.E.2d 791 (Ind. Ct. App. 1994).

32. *Id.* at 794.

33. *Id.*

34. See *DeShaney v. Winnebago County Dep't of Social Svcs.*, 489 U.S. 189 (1989) (duty to provide welfare); *State v. Flanigan*, 489 N.E.2d 1216 (Ind. Ct. App. 1986) (duty to control traffic); *City of Hammond*

plaintiff has alleged only the violation of a public duty, the plaintiff's case will fail.³⁵ Creative plaintiff's attorneys, however, try to avoid this result by alleging that a "special relationship" existed sufficient to create a private duty in addition to a public duty. This approach was used in *J.A.W. v. Roberts*³⁶ with mixed results.

In *J.A.W.*, the Indiana Court of Appeals addressed the requirements of a special relationship in the context of reporting child abuse. *J.A.W.*, a minor, alleged that after he was made a ward of the juvenile court and placed with a foster family, his foster father and numerous other persons sexually molested or physically assaulted him. He then sued the sister of his foster father, three clergy members and several other persons whom he claimed had knowledge of the molestations, materially assisted in covering up the molestations, and failed to report the abuse to the appropriate local authorities.³⁷

The key to the appellate court's decision was whether the defendants owed an actionable duty to the plaintiff. The court determined whether a common law duty exists by balancing "three competing factors": the relationship between *J.A.W.* and each of the appellees; the reasonable foreseeability of harm to *J.A.W.*; and public policy concerns.³⁸

1. *Relationship.*—As to the relationship between the sister of his foster father and *J.A.W.*, the court found the interaction between them was not sufficient to give rise to a special relationship.³⁹ Plaintiff's admission that he never sought the advise and counsel of the sister of his foster father regarding the molestations, or even told her about them, was important in the court's decision. The fact that the sister knew of the molestations because of correspondence from the foster father was not considered relevant, since it was outside of the relationship between *J.A.W.* and the sister.⁴⁰

Regarding the three members of the clergy, the court rejected plaintiff's contention that their status as counselors or clergy, in itself, was sufficient to create a special relationship.⁴¹ The court stated that "whether a special relationship exists is fact sensitive

v. Cataldi, 449 N.E.2d 1184 (Ind. Ct. App. 1983) (duty to fight fires); Crouch v. Hall, 406 N.E.2d 1184 (Ind. Ct. App. 1980) (duty to arrest criminal suspect).

35. There are, however, exceptions to this rule. The exceptions usually arise when the attempted object of liability has created the danger that ultimately caused the plaintiff's injury. See, e.g., *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 389 (1993) (defendant's actions of arresting designated driver and leaving car and car keys in the custody of drunk passenger who officers knew or should have known was intoxicated state a claim for plaintiff and his decedents, whom the drunk driver struck); *Wood v. Ostrander*, 879 F.2d 583, 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990) (triable issue of fact where plaintiff alleges that the defendant "affirmatively placed [her] in a position of danger" when defendant arrested driver and left female plaintiff passenger in a high crime area where she was subsequently raped); *Maroon v. State*, 411 N.E.2d 404 (Ind. Ct. App. 1980) (arguable state liability based upon alleged negligence in allowing the escape of prisoner who traveled to a different state and assaulted plaintiff).

36. 627 N.E.2d 802 (Ind. Ct. App. 1994).

37. *Id.* at 806.

38. *Id.* at 809 (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

39. *Id.*

40. *Id.*

41. *Id.*

and dependent on the level of interaction or dependency between the parties that surpasses what is common or usual.”⁴²

Relative to Bottorff, one of the clergy, the court noted that although he provided marital counseling for the foster father and mother, was aware of the sexual relationship between J.A.W. and the foster father, and J.A.W. attended three marriage counseling sessions, his relationship with J.A.W. did not “reveal a level of interaction or dependency which can be characterized as a special relationship.”⁴³ The fact that Bottorff did not counsel J.A.W. regarding the molestations and did not advise the plaintiff was important to the court.⁴⁴

As to another pastoral counselor, Chastain, although J.A.W. alleged that during a six-month period he spoke to Chastain about his sexual relationship with the foster father and that three of these conversations were in the church, the court found that these allegations were not sufficient to create a special relationship.⁴⁵ The court stated that the allegations showed that Chastain had knowledge of the criminal activity, but that knowledge alone was insufficient to create a special relationship.⁴⁶

Regarding the other clergy, Francis, the court found that J.A.W.’s allegations were sufficient to create a genuine issue of material fact about whether a special relationship existed.⁴⁷ Specifically, J.A.W. alleged that Francis met with him more than fifty times and, more importantly, when J.A.W. sought help from Francis concerning the abuse, the clergy advised him that in the future he could move out of the foster home, but in the meantime he “should pray to make sure his soul is saved.”⁴⁸ The court said that if these allegations were true, a special relationship existed.⁴⁹

2. *Foreseeability.*—The defendants argued that the injuries of continued abuse were not “foreseeable” because a prior reporting to the Marion County Department of Public Welfare was an intervening cause.⁵⁰ The court rejected this argument on the grounds that proximate cause is normally a question of fact decided by the jury unless only one inference or conclusion can be drawn from the undisputed facts. In addition, the factors to determine foreseeability are not the same as those used to determine proximate cause. The court stated that, in analyzing the foreseeability component in determining the existence of a duty, “we must examine what forces and human conduct should have appeared on the scene, and we weigh the dangers likely to flow from the challenged conduct in light of these forces and conduct.”⁵¹ The court concluded that once the

42. *Id.* at 810 (citing *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991); *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630 (Ind. 1991); *Miller v. Griesel*, 308 N.E.2d 701 (Ind. 1974); *Johnson v. Pettigrew*, 595 N.E.2d 747 (Ind. Ct. App. 1992), *trans. denied*, Dec. 16, 1992; and *Welch v. Railroad Crossing, Inc.*, 488 N.E.2d 383 (Ind. Ct. App. 1986)).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 811.

49. *Id.*

50. *Id.* at 812.

51. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 997 (Ind. 1991)).

defendants knew of the abuse, it was foreseeable that their failure to report it "created an unreasonable risk that the abuse would continue."⁵²

3. *Public Policy.*—Although the court had "no quarrel" with plaintiff's argument that the effect of not reporting child abuse has a devastating effect on its victims, it nonetheless concluded that absent legislative action, it was not convinced that creating a civil cause of action for failing to report child abuse was "good public policy."⁵³ Specifically, the court noted that the Indiana General Assembly had already provided for a criminal penalty for failing to make a report.⁵⁴ The court also pointed out that only seven states had codified such a private right of action.⁵⁵ Finally, the court mentioned the case of *Borne v. Northwest Allen County School Corp.*, which had made a comprehensive analysis of the criminal reporting statute as well as the common law.⁵⁶

Based on its analysis of these three factors, the court concluded that the plaintiff had sufficiently alleged the existence of a special duty only as to defendant Francis.⁵⁷ Therefore, the court reversed the summary judgment granted to defendant Francis and affirmed summary judgment granted to the other defendants.⁵⁸

Judge Bartea wrote an opinion concurring only in the result. She concluded that once a court has determined that a special relationship does not exist, there is no reason to analyze the other factors articulated in *Webb* to determine whether a duty exists.⁵⁹ Judge Bartea stated a simple, logical and pragmatic rule: "[W]here the negligent action is for nonfeasance, absent a special relationship, no duty, and therefore no liability, will attach."⁶⁰

Judge Sullivan authored an opinion concurring in part and dissenting in part in which he concluded that no actionable claim had been asserted against defendant Francis.⁶¹ He stated that the existence of a duty did not depend upon the finding of a special relationship between the parties, and objected to the distinction between misfeasance and nonfeasance in the analysis of the existence of a duty.⁶² He further found that the alleged failure to report did not, as a matter of law, proximately cause any injury to J.A.W.⁶³

52. *Id.*

53. *Id.* at 813.

54. *Id.*; IND. CODE § 31-6-11-20 (1993).

55. *J.A.W.*, 627 N.E.2d at 813 (citing ARK. CODE § 12-12-503(b) (1987); COLO. REV. STAT. § 19-3-304(4)(b) (1990 Supp.); IOWA CODE § 232.75 (1994); MICH. COMP. LAWS § 722.633 (1993); MONT. CODE § 41-3-207 (1993); N.Y. SOC. SERV. LAW § 420 (1992); and R.I. GEN. LAWS § 40-11-6.1 (1990)).

56. 532 N.E.2d 1196 (Ind. Ct. App. 1989), *trans. denied*, 558 N.E.2d 828 (Ind. 1990). Because the plaintiff on appeal conceded that the statute itself did not create a private right of action for non-reporting, the court did not rely heavily on *Borne*.

57. *J.A.W.*, 627 N.E.2d at 813.

58. *Id.*

59. *Id.* at 814.

60. *Id.*

61. *Id.* at 815.

62. *Id.*

63. *Id.*

D. 911 Cases

Two 911 emergency dispatcher cases arose in the past year that also illustrate the nature of duties allegedly breached by acts of nonfeasance. *Mullin v. Municipal City of South Bend*⁶⁴ involved a claim brought by a parent who alleged that the city of South Bend negligently failed to immediately dispatch an ambulance to the Mullin household, which was on fire. One of the plaintiff's minor children died and another was injured in the fire. Plaintiff claimed that the dispatcher should have known to immediately send an ambulance when a neighbor told the dispatcher that she thought people were inside the house.⁶⁵ After disposing of the city's claims of immunity under Indiana Code section 34-4-16.5-3(6) and (7),⁶⁶ the court concluded that the plaintiff did not show the existence of a private duty.⁶⁷ The court examined the tests used in New York⁶⁸ and Georgia⁶⁹ to determine the existence of a special duty, and concluded that Georgia's test was the better-reasoned rule of law.⁷⁰ The court concluded that a special duty existed upon the following showing: an explicit assurance of action by the municipality to the plaintiff for his or her benefit, the municipality's knowledge that a failure to act could result in harm, and justified and detrimental reliance by the plaintiff on the municipalities' assurance.⁷¹ In applying this test to the claims of Mullin, the court concluded that the plaintiff had failed to establish the existence of a special duty because no evidence of either an assurance or detrimental reliance existed.⁷²

The Indiana Court of Appeals found a breach of a special duty in the case of *City of Gary v. Odie*.⁷³ The court in *Odie* applied the four-part test set out in *Cuffy v. City of New York*⁷⁴ and concluded that the jury's decision that a special relationship existed and had been breached was supported by the facts and the law applicable to the case.⁷⁵ The court specifically found that the assurance given to the plaintiff that an ambulance "was on its way" had "lulled [her] into inaction" and, thus, proximately caused the death of her husband.⁷⁶ It is interesting to note that the court found the "direct contact" requirement

64. 639 N.E.2d 278 (Ind. 1994).

65. *Id.* at 280.

66. The fire, which occurred on November 5, 1985, preceded the effective date of IND. CODE § 34-4-16.5-3(17) (1993).

67. *Mullin*, 639 N.E.2d at 281-83.

68. See *Cuffy v. City of New York*, 505 N.E.2d 937, 940 (N.Y. 1987).

69. See *Rome v. Gordan*, 426 S.E.2d 861, 863 (Ga. 1993).

70. *Mullin*, 639 N.E.2d at 284. The test in *Rome* does not require direct contact between the injured person and the municipality.

71. *Id.*

72. *Id.* at 285.

73. 638 N.E.2d 1326 (Ind. Ct. App. 1994). Although this incident occurred after the enactment of IND. CODE § 34-4-16.5-3(17) (1993), the city of Gary failed to assert this statute as an affirmative defense. Had it done so, the result would likely have been different. Judge Baker, in his concurring opinion, specifically stated that his ruling would have been different had the city asserted this affirmative defense.

74. See 505 N.E.2d 937, 940 (N.Y. 1987).

75. *Odie*, 638 N.E.2d at 1334.

76. *Id.*

satisfied by the repeated contact between the wife-administratrix and the municipality, whereas the direct contact element in *Cuffy* requires the contact to be between the *injured party*—which, in *Odie*, would have been the decedent-husband—and the municipality. No evidence showed any communication between the decedent-husband and the municipality. Nevertheless, *Mullin* effectively obviates the rather harsh “direct contact” element articulated in *Cuffy*.

E. Recreational Use Immunity

Indiana’s recreational use statute was visited in *Kelly v. Lakewood Apartments*.⁷⁷ In *Kelly*, the plaintiff, a six-year-old child, was injured when his sled struck a raised, snow-covered manhole cover while the child was sledding on a hill in the defendant’s apartment complex.⁷⁸ After applying the rules of statutory construction, the court of appeals concluded that Indiana Code section 14-2-6-3⁷⁹ provided immunity from liability to landowners.⁸⁰ The court concluded that:

The only reasonable interpretation of the statute is that subject to the exceptions listed in the statute (attractive nuisance and malicious or illegal acts), the statute excuses an owner from liability to persons (other than business invitees and invited guests) using the property for recreational purposes without pay of monetary consideration, whether injury is cause by the condition of the land or by another recreational user.⁸¹

F. Fireman’s Rule

In *Heck v. Robey*,⁸² the court of appeals extended the fireman’s rule to paramedics who are injured while rescuing accident victims because of the negligence of the victim.⁸³

77. 622 N.E.2d 1044 (Ind. Ct. App. 1993).

78. *Id.* at 1045-46.

79. IND. CODE § 14-2-6-3 (1993) provides:

Any person who goes upon or through the premises including, but not as a limitation, lands, caves, waters, and private ways of another with or without permission to hunt, fish, swim, trap, camp, hike, sightsee, or for any other purposes, without the payment of monetary consideration, or with the payment of monetary consideration directly or indirectly on his behalf by an agency of the state or federal government, is not thereby entitled to any assurance that the premises are safe for such purpose. The owner of such premises does not assume responsibility for nor incur liability for any injury to person or property caused by an act or failure to act of other persons using such premises. The provisions of this section shall not be construed as affecting the existing case law of Indiana of liability of owners or possessors of premises with respect to business invitees in commercial establishments nor to invited guests nor shall this section be construed as to affect the attractive nuisance doctrine. Nothing in this section contained shall excuse the owner or occupant of premises from liability for injury to persons or property caused by the malicious or illegal acts of the owner or occupant.

80. *Kelly*, 622 N.E.2d at 1048-49.

81. *Id.* at 1047.

82. 630 N.E.2d 1361 (Ind. Ct. App. 1994).

83. *Id.* at 1364.

Indiana's "rescue doctrine" provides that one who has negligently endangered the safety of another may be held liable for the injuries sustained by the third person attempting rescue.⁸⁴ The fireman's rule is an exception to this doctrine that holds the defendant to the lesser standard of care of abstaining from any positive wrongful act that may result in injury.⁸⁵ After balancing the three factors articulated in *Webb v. Jarvis*⁸⁶ to determine whether a duty existed, the court stated that "the reasons behind the fireman's rule support an extension to a paramedic such as Robey."⁸⁷ After finding that Heck's conduct was neither a "positive wrong" nor a "willful and wanton" act purposefully directed at Robey, and that the statute in question was not for the benefit of public safety officers, the court concluded that the fireman's rule precluded liability since no duty was owed to Robey.⁸⁸

G. Impact Rule

Two court of appeals decisions have provided some insight into the modified impact rule established by the Indiana Supreme Court in *Shuamber v. Henderson*.⁸⁹ In *J.L. v. Mortell*,⁹⁰ the court discussed when a person could recover damages for negligent infliction of emotional distress. In this case, the plaintiff asserted that her physical therapist had performed inappropriate and unnecessary vaginal massages from which she suffered severe physical and emotional distress when she learned the massages were inappropriate.⁹¹

The court of appeals found that this case could not be distinguished from *Shuamber* since the plaintiff sustained a direct impact from the vaginal massages that caused her serious emotional trauma "of a kind and extent normally expected to occur in a reasonable person."⁹² The court concluded the plaintiff stated a claim for emotional distress "without regard to whether the emotional trauma arose out of or accompanied any physical injury."⁹³

In *Gorman v. I & M Electric Co.*,⁹⁴ the court of appeals rejected a claim for emotional distress by a woman who watched her family home burn down. At one point, the Gorman's thought that one of their minor children was still in the house, so Mr. Gorman went into the burning house to find the child. After determining the child was not in the house, and while he was leaving, Mr. Gorman fell and injured himself.⁹⁵ It was undisputed that Mrs. Gorman sustained no impact during the events in question.⁹⁶

84. *Id.* at 1363 (citing *Lambert v. Parish*, 492 N.E.2d 289, 291 (Ind. 1986)).

85. *Id.*

86. See 575 N.E.2d 992 (Ind. 1991).

87. *Kelly*, 622 N.E.2d at 1367.

88. *Id.* at 1368. See *Thompson v. Murat Shrine Club, Inc.*, 639 N.E.2d 1039 (Ind. Ct. App. 1994) (denying request to court of appeals to distinguish or abandon fireman's rule).

89. 579 N.E.2d 452 (Ind. 1991).

90. 633 N.E.2d 300 (Ind. Ct. App. 1994).

91. *Id.* at 301.

92. *Id.* at 304.

93. *Id.*

94. 641 N.E.2d 1288 (Ind. Ct. App. 1994).

95. *Id.* at 1289.

96. *Id.* at 1290.

The court of appeals rejected plaintiff's request that the impact rule be abolished and replaced with the "zone of danger" rule or, alternatively, that the court recognize an exception to the impact rule when a person suffers a traumatic experience that causes emotional injury whether or not there is impact or physical harm.⁹⁷ The court concluded that Mrs. Gorman would not have benefited from such an expansion of the tort law, because she did not witness the injury of her husband.⁹⁸ Moreover, allowing her to recover for her mistaken fear that her child was inside the burning building would effectively abolish the impact rule, and remove the injury requirement.⁹⁹

II. TORTS INVOLVING INSURANCE CONTRACTS

A. Breach of Insurance Contracts as a Separate Tort

In 1993, the Indiana Supreme Court issued its decision in *Miller Brewing Co. v. Best Beers of Bloomington, Inc.*,¹⁰⁰ which allowed punitive damages in an action for breach of contract if an independent tort, for which punitive damages could be awarded, was also proven.¹⁰¹ In *Erie Insurance Co. v. Hickman*,¹⁰² the supreme court applied the *Miller Brewing Co.* analysis to insurance contracts and further explained the prerequisites for an award of punitive damages. In *Erie*, the plaintiffs sought to recover from the defendant insurance company for breach of an insurance contract, and also for punitive damages.¹⁰³ The claim arose from an automobile collision in which Hickman was making a left turn from 34th Street onto Sherman Drive in Indianapolis when she was struck by a car driven by Gregory Davis. The car driven by Hickman was owned by her mother, Smith, who had both liability and uninsured motorist coverage. There was some dispute as to the color of the stoplight at the time the accident occurred. The original police report showed Davis as being "primarily at fault for the collision."¹⁰⁴ However, that report was later amended to show that Hickman was at fault for the collision. In addition, confusion arose over the status of Davis's automobile insurance at the time of the accident. Initially, Erie Insurance believed that Davis was insured at the time of the accident, which would have precluded Hickman from recovering from Erie Insurance under the uninsured motorist coverage. More than a year later, Erie Insurance determined that Davis was actually uninsured at the time of the collision. By that time, Erie Insurance had completed its investigation and determined that Hickman was more than fifty percent at fault for the

97. California, for example, has a "zone of danger" rule that considers whether the plaintiff was near the scene of the accident, whether the shock resulted from a direct observance of the accident, and the relationship between the plaintiff and the victim in determining liability. See *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

98. *Gorman*, 641 N.E.2d at 1291.

99. *Id.* at 1290.

100. 608 N.E.2d 975 (Ind. 1993).

101. *Id.* at 984. For a detailed discussion of this decision and its impact, see Judy L. Woods & Brad A. Galbraith, *Recent Developments in Contract and Commercial Law*, 27 IND. L. REV. 769 (1994).

102. 622 N.E.2d 515 (Ind. 1993).

103. *Id.* at 517.

104. *Id.* at 521.

accident and, thus, ineligible to make a claim under the uninsured motorist provision of the insurance policy.¹⁰⁵

Smith and Hickman filed suit against Davis for personal injury and property damage resulting from the collision, and against Erie Insurance for breach of the insurance contract.¹⁰⁶ Plaintiffs also “alleged that Erie acted in bad faith and requested punitive damages.”¹⁰⁷ The jury awarded both plaintiffs the full amount of compensatory damages they sought as well as punitive damages.¹⁰⁸

In analyzing the claim for punitive damages, the court noted that in *Miller Brewing Co.*¹⁰⁹ it had held that “to recover punitive damages in a lawsuit founded upon a breach of contract, the plaintiff must plead and prove the existence of an independent tort of the kind for which Indiana law recognizes that punitive damages may be awarded.”¹¹⁰ The intent of that decision “was to prohibit the recovery of punitive damages, which is a tort remedy, where no tort has been established.”¹¹¹

Prior Indiana decisions had suggested that an insured could “recover punitive damages from an insurer when the insurer’s breach of the insurance contract was accompanied by a serious wrong, tortious in nature.”¹¹² Since this “substantial equivalent” was available, “courts declined to recognize the existence of a separate tort remedy” for the failure of an insurer to act in good faith.¹¹³ However, the decision in *Miller Brewing Co.* overturned prior case law to the extent that it held that a breach of contract could not be the basis of an award of punitive damages unless the plaintiff pleaded and proved the “existence of an independent tort of the kind [for] which Indiana law recognizes punitive damages.”¹¹⁴ However, the court noted that “the contract at issue in *Miller Brewing Co.* did not involve insurance and, as a result, we did not address the question of whether a tort remedy was available to an insured when the insurer fails to fulfill duties imposed upon it by law.”¹¹⁵

The *Erie* court then analyzed the relationship between the insurer and the insured to determine if a tort obligation arose from that relationship. Implicit in all insurance contracts is a duty “that the insurer deal in good faith with its insured.”¹¹⁶ To determine if a tort results from a breach of a duty, the court must balance three factors: “the relationship between the parties, the reasonable foreseeability of harm to the person injured, and public policy concerns.”¹¹⁷ The court found that although a contract alone

105. *Id.* at 521-22.

106. *Id.* at 522.

107. *Id.*

108. *Id.*

109. 608 N.E.2d 975 (Ind. 1993).

110. *Erie*, 622 N.E.2d at 518.

111. *Id.*

112. *Id.* (citing *Vernon Fire & Casualty Ins. Co. v. Sharp*, 349 N.E.2d 173, 180 (Ind. 1976)).

113. *Id.* (citing *Liberty Mut. Ins. Co. v. Parkinson*, 487 N.E.2d 162, 165 (Ind. Ct. App. 1985)).

114. *Id.*

115. *Id.*

116. *Id.* (citing *Wedzeb Enter. v. Aetna Life & Casualty Co.*, 570 N.E.2d 60, 63 (Ind. Ct. App. 1991); *Liberty Mut. Ins. Co.*, 487 N.E.2d at 164; *Vernon Fire & Casualty Ins. Co.*, 349 N.E.2d at 181).

117. *Id.* (citing *Webb v. Jarvis*, 575 N.E.2d 992, 995 (Ind. 1991)).

does not create the “special relationship” necessary for a tort duty to arise, “the unique character of the insurance contract” gives rise to a “special relationship.”¹¹⁸ Further, the harm that results when an insured’s valid claim is denied in good faith is easily foreseeable.¹¹⁹ Finally, the court stated that public policy favored the imposition of a duty of good faith between the insurer and the insured.¹²⁰

The court did not find it necessary to fully define the scope of the duty the insurance company owed to the insured. It generally observed that the duty included “the obligation to refrain from making an unfounded refusal to pay policy proceeds, causing an unfounded delay in making payment, deceiving the insured, and exercising any unfair advantage to pressure an insured into settlement of his claim.”¹²¹ A breach of the obligation to deal in good faith with the insured does not arise every time an insurance company wrongly denies a claim. If there was a good faith basis for the denial, then there should be no tort.¹²² The breach occurs when an insurer denies a claim when “no rational, principled basis [exists] for doing so.”¹²³

However, in the present case, the court did not follow that rationale. It upheld the jury’s award of compensatory damages even though it noted that the only dispute was whether Hickman was primarily at fault for the accident.¹²⁴ Although the jury disagreed with Erie Insurance on that fact, the record reflected that “there was a rational, principled basis for the denial of the claim.”¹²⁵ In addition, the court noted that the denial was made in good faith.¹²⁶ Even though these facts appear to meet the test promulgated by the court for the lack of a breach of the duty to deal in good faith, the court nevertheless upheld the award of compensatory damages.¹²⁷

The second part of the *Erie* decision concerns punitive damage awards for breach of this special duty. The court held that “proof that a tort was committed is not sufficient to establish the right to punitive damages.”¹²⁸ Rather, an award of punitive damages is only proper when

there is clear and convincing evidence that the defendant “acted with malice, fraud, gross negligence, or oppressiveness which was not the result of a mistake of fact or law, honest error or judgment, overzealousness, mere negligence, or other human failing, in the sum [that the jury believes] will serve to punish the defendant and to deter it and others from like conduct in the future.”¹²⁹

118. *Id.*

119. *Id.*

120. *Id.* at 519.

121. *Id.*

122. *Id.* at 520. Rather, “[t]hat insurance companies may, in good faith, dispute claims, has long been the rule in Indiana.” *Id.* (citations omitted).

123. *Id.* (citations omitted).

124. *Id.* at 523.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 520.

129. *Id.* (citing *Bud Wolf Chevrolet, Inc. v. Robertson*, 519 N.E.2d 135, 137-38 (Ind. 1988)).

The court reversed the award of punitive damages because a reasonable jury could not find that Erie's conduct met that standard.¹³⁰

This case has had and will continue to have a great impact on decision-making by insurance companies and their counsel because the court upheld the award of compensatory damages even though it found a "rationale, principled basis" for Erie's decision to deny plaintiffs coverage. When faced with a claim by an insured that is probably not covered by the insurance policy, the insurance company now has a difficult decision to make. Should it ignore the coverage questions and defend the insured against the suit? In doing so, the insurer insulates itself against a later claim by the insured for breach of duty, but may end up paying funds to a plaintiff even though there is a good faith dispute concerning coverage. The insurer's other option is to deny coverage. If the insured decides to file suit against the insurer, however, the insurer must withstand the scrutiny of a jury who will second-guess the insurer's decision to deny coverage. Apparently, the jury can then award damages to the insured for breach of a duty to deal in good faith even if there was a good faith basis for the denial of coverage. The insurance company is left with a Hobson's choice.

A few cases have applied this new standard in Indiana insurance cases. One is *McLaughlin v. State Farm Mutual Automobile Insurance Co.*¹³¹ In *McLaughlin*, State Farm denied coverage to McLaughlin when his truck was destroyed in a fire. The denial was based on evidence that the fire was intentionally set by McLaughlin. State Farm based its decision on a number of facts, including the following: the truck was locked at the time the fire occurred; McLaughlin could not accurately account for his whereabouts at the time of the fire; he was behind in truck payments; he was behind in payments on his trailer; and the radio and battery had been removed from the truck prior to the fire.¹³² The court, following the rationale in *Erie*, held that there was no clear and convincing evidence of malice, oppressiveness, and so forth that would support an award of punitive damages.¹³³ However, the evidence could support a finding "that the denial of coverage was unreasonable and therefore tortious or, in any event, a breach of contract."¹³⁴

B. Bad Faith for Failing to Settle a Claim

The Indiana Court of Appeals attempted to answer the question of the measure of damages when a breach of contract by an insurance company results in a judgment in excess of the policy limits. In *Economy Fire & Casualty Co. v. Collins*,¹³⁵ Economy issued an automobile insurance policy to John Terry. Terry was involved in an automobile accident with Collins in which he was killed and Collins was injured.¹³⁶ Collins's final settlement demand prior to trial was considerably less than the \$50,000 policy limit, but Economy rejected it.¹³⁷ After a trial, the jury awarded Collins

130. *Id.*

131. 30 F.3d 861 (7th Cir. 1994).

132. *Id.* at 863-65.

133. *Id.* at 870.

134. *Id.*

135. 643 N.E.2d 382 (Ind. Ct. App. 1994).

136. *Id.* at 383.

137. *Id.* at 384.

\$386,155.01.¹³⁸ After Economy paid the limits of coverage provided by the policy, a judgment of \$336,155.01 remained against Terry's estate.¹³⁹ Since the estate was insolvent, Terry's personal representative assigned the estate's rights against Economy to Collins in exchange for a release from an execution of judgment.¹⁴⁰ When Collins brought suit against Economy, the insurance company filed a motion for summary judgment requesting that any damages "be limited to the actual value of the assets in the injured's estate."¹⁴¹

Since Indiana had not yet adopted a measure of damages, the court looked at the two approaches taken by other states. The majority approach is the "judgment rule."¹⁴² Under this rule, the insurer is "liable for the entire excess judgment in instances of bad faith."¹⁴³ The minority approach is the "payment rule," which "dictates that an insurer may be held liable for a judgment in excess of policy limits only if part or all of the judgment has been paid by the insured."¹⁴⁴ The court decided that the judgment rule was a better rule because it did not allow the insurer to "hide behind the financial status of its insured."¹⁴⁵ If an insured did not have financial resources to pay an excess judgment, an insurer would be tempted to refuse to settle the claim because, if the result was an excess judgment, the insurer would only be liable for the full policy amount since the insured could not pay the excess judgment. In addition, even though the insured would not be damaged monetarily by not being reimbursed for amounts he had to pay, the insured's credit would be damaged and there would be clouds on the titles of his property. Because Indiana "discourages insurance companies from rendering disparate treatment to insureds based upon their financial status," the court chose to adopt the judgment rule.¹⁴⁶

If this rule is used in conjunction with *Erie*'s low standard for bad faith, the result could be even more damaging to insurance companies and more advantageous for plaintiffs. For example, an insurance company could determine that an insured's policy does not cover a particular incident. If the insurance company chooses not to defend the insured in a suit brought against him, it takes a risk that the insured's attorney could defend him poorly resulting in a judgment far in excess of the policy limits. The insured can then bring suit against the insurer for breaching its duty to deal in good faith. If a jury agrees that the insurance company should have accepted the claim, it may then be liable for the total amount of the excess judgment. The end result is that insurance companies may have to begin defending suits where coverage is questionable or nonexistent, simply to avoid the risk of a larger payout later. These larger settlements and payments when there is no coverage will increase the cost of insurance for everyone.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 385.

144. *Id.*

145. *Id.*

146. *Id.*

III. NEW CAUSES OF ACTION/CASES OF FIRST IMPRESSION

A. Pharmacist Liability

During the 1994 Survey period, the Indiana Supreme Court held that a pharmacist who allows a customer to refill a prescription at a rate faster than normal is negligent. In *Hooks-SuperX, Inc. v. McLaughlin*,¹⁴⁷ a customer became addicted to painkillers that had been prescribed for back pain. At times, the prescriptions were being used two and one half times faster than the prescribed rate. However, each of the prescriptions had been either a written prescription telephoned in to the pharmacy by the doctor's office, or were refills authorized by the doctor. The doctor realized that the prescriptions were being used much too quickly and refused to prescribe any more medication. However, by this time, the plaintiff had been taking the painkillers for over one and one-half years. After the plaintiff underwent drug treatment, he brought suit against Hook's alleging it owed a duty to refrain from filling the prescriptions because the pharmacists knew or should have known of his drug addiction.¹⁴⁸

The Indiana Court of Appeals refused to hold that the pharmacists owed a duty to the customer.¹⁴⁹ One rationale was that pharmacists should not second-guess the doctor's judgment.¹⁵⁰ Although pharmacists are prohibited from dispensing prescriptions in bad faith, there was no showing in the present case that the pharmacists acted in bad faith.¹⁵¹ In addition, even though pharmacists cannot be held civilly liable for refusing to refill a prescription based upon a belief that it is illegal, not in the best interest of the patient, aids an addiction, or is not beneficial to the customer's health or safety, the statute does not impose a duty to refuse to refill the prescription.¹⁵² The court's final rationale for refusing to impose a duty on the pharmacist was that doing so would cause the pharmacist to be inserted into the physician-patient relationship. The court stated:

The decision of weighing the benefits of a medication against potential dangers that are associated with it requires an individualized medical judgment. This individualized treatment is available in the context of a physician-patient relationship which has the benefits of medical history and extensive medical examinations. It is not present, however, in the context of a pharmacist filling a prescription for a retail customer. The injection of a third-party . . . into the physician-patient relationship could undercut the effectiveness of the ongoing medical treatment.¹⁵³

In the present case, one of the pharmacists even spoke with the doctor about how quickly the prescriptions were being used and was instructed by the doctor to refill the

147. 642 N.E.2d 514 (Ind. 1994) [hereinafter *Hooks II*].

148. *Id.* at 516.

149. *Hooks-SuperX, Inc. v. McLaughlin*, 632 N.E.2d 365, 369 (Ind. Ct. App. 1994) [hereinafter *Hooks I*].

150. *Id.* at 368.

151. *Id.* (citing IND. ADMIN. CODE tit. 856 r. 1-20-1(g) (1992)).

152. *Id.* (citing IND. CODE § 25-26-13-16(b) (1993)).

153. *Hooks I*, 632 N.E.2d at 368 (quoting *Ingram v. Hook's Drugs, Inc.*, 476 N.E.2d 881, 886-87 (Ind. Ct. App. 1985)).

prescription.¹⁵⁴ The court determined that, not only should a pharmacist not be inserted into the doctor-patient relationship, the pharmacist should be able “to rely on the physician’s instructions in good faith as a matter of law.”¹⁵⁵

The supreme court employed a different rationale than the court of appeals. It analyzed the case in terms of whether the three aspects of a duty, relationship, foreseeability and public policy, were present.¹⁵⁶ The court recognized that a relationship giving rise to a duty existed between the pharmacist and customer in other circumstances.¹⁵⁷ That relationship is based in contract law, and courts have long recognized that contracts can give rise to relationships sufficiently close to justify the imposition of a duty.¹⁵⁸ In addition, a customer relies upon the pharmacist’s expertise and judgment in filling prescriptions.¹⁵⁹ Therefore, the court found that a sufficient relationship existed to justify imposing a duty upon pharmacists to refuse to fill prescriptions.¹⁶⁰

The injury to a customer when a pharmacist acquiesces to filling prescriptions at a faster rate than normal is foreseeable when the prescription is for an addictive drug.¹⁶¹ Therefore, the foreseeability aspect of the test was also fulfilled.

Finally, the court examined whether public policy supported the imposition of a duty on pharmacists. The court determined that three policy considerations were at issue—“preventing intentional and unintentional drug abuse, not jeopardizing the physician/patient relationship, and avoiding unnecessary health care costs.”¹⁶² Although various statutes regarding physicians, such as those noted in the court of appeals’ opinion, are not the source of a duty for pharmacists, they do show the public concern for drug abuse.¹⁶³ Making the pharmacist responsible for monitoring the rate at which prescriptions are filled helps to prevent both drug addiction by the customer and also prevents the customer from providing the drugs to anyone else.¹⁶⁴ In addition, the court reasoned that placing this duty on pharmacists will not intrude upon the doctor-patient relationship because the pharmacist’s role is different from the doctor’s. A doctor is responsible for “properly prescribing medication” and “evaluat[ing] a patient’s needs.”¹⁶⁵ Finally, the court stated that imposing this duty upon pharmacists would not increase the costs of health care because many drug stores, including Hooks, already monitor prescriptions with computers and have access to the information necessary to fulfill the duty imposed.¹⁶⁶

154. *Id.*

155. *Id.* (footnote omitted).

156. *Hook’s II*, 642 N.E.2d at 517-18.

157. *Id.* at 517.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 518.

163. *Id.*

164. *Id.*

165. *Id.* at 519.

166. *Id.*

Once the court determined that a duty existed under these circumstances, it had to determine the standard of care necessary.¹⁶⁷ The court adopted the traditional negligence standard and held that "pharmacists must exercise that degree of care that an ordinarily prudent pharmacist would under the same or similar circumstances."¹⁶⁸ Many factors will be considered in determining whether the proper degree of care was exercised, including:

the frequency with which the pharmacist filled prescriptions for the customer, any representations made by the customer, the pharmacist's access to historical data about the customer, the manner in which the prescription was tendered to the pharmacists, and the like.¹⁶⁹

The purpose of the decision was not to make the pharmacist an insurer of the customer's safety.¹⁷⁰ Customers must still exercise their own responsibility and use their own knowledge concerning the dangers of prescription drugs.¹⁷¹

The facts of the present case, however, do seem to place Hooks in the position of an insurer of McLaughlin's health. Prior to having the prescriptions at issue in this case filled, McLaughlin had been addicted to the drugs for at least six years and had received treatment for his addiction three times.¹⁷² He knew of the addictive nature of the drugs. In addition, one pharmacist testified that he had telephoned the doctor to question the frequency of the prescriptions and was instructed by the doctor to dispense the prescription.¹⁷³ Refusing to refill the prescription would have caused the pharmacist to interfere in the doctor-patient relationship and replace the doctor's decision with his own.

An additional issue in this case is causation. Hooks argued that even if a duty existed, "McLaughlin's suicide attempt and his own wrongful conduct in consuming substances he knew were addictive constituted [an] independent intervening cause sufficient to cut off any liability of Hooks."¹⁷⁴ The court rejected this argument and stated:

[I]f harm is a natural, probable, and foreseeable consequence of the first negligent act or omission, the original wrongdoer may be held liable even though other independent agencies intervene between his negligence and the ultimate result. Generally, where harmful consequences are brought about by intervening and independent forces, the operation of which might have been reasonably foreseen, then the chain of causation extending from the original wrongful act to the injury is not broken by the intervening and independent forces, and the original wrongful act will be treated as a proximate cause . . .¹⁷⁵

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 519-20.

172. *Id.* at 516.

173. *Hooks I*, 632 N.E.2d at 368.

174. *Hooks II*, 642 N.E.2d at 520.

175. *Id.* (quoting 21 INDIANA LEGAL ENCYCLOPEDIA, *Negligence* § 67 (1959)).

Suicide is considered an intervening act if the person "is sane enough to realize the effect of his actions."¹⁷⁶ However, "suicide induced by mental illness" may not be an intervening act.¹⁷⁷ If the trial court determined that there was "a genuine issue of material fact" concerning whether the suicide attempt was voluntary or involuntary, it was correct in denying the motion for summary judgment.¹⁷⁸

B. Wrongful Death Actions by Dependent Next of Kin

During this Survey period, the Indiana Court of Appeals considered the question of recovery for emotional damages by dependent next of kin under the Wrongful Death Statute¹⁷⁹ in *Ed Wiersma Trucking Co. v. Pfaff*.¹⁸⁰ This statute allows dependent next of kin, together with spouses and children, to recover pecuniary damages.¹⁸¹ In addition, emotional damages are also recoverable by spouses and dependent children.¹⁸² However, until *Wiersma Trucking*, the question of whether dependent next of kin were also entitled to receive emotional damages had not been decided.¹⁸³

Dallis Pfaff was killed in an accident involving a truck driven by John Carter, an employee of Wiersma Trucking.¹⁸⁴ Dallis's mother claimed that she was unable to support herself and that twenty-year-old Dallis and her siblings were her sole source of support.¹⁸⁵ The wrongful death claim brought by Dallis's estate against Wiersma Trucking sought compensation for her mother's emotional damages.¹⁸⁶ Wiersma Trucking

176. *Id.*

177. *Id.* at 521.

178. *Id.*

179. The Wrongful Death Statute is found at IND. CODE § 34-1-1-2 (1993). The relevant portions of it are as follows:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefore against the latter . . . and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission. That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be, and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. . . . When such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees.

180. 643 N.E.2d 909 (Ind. Ct. App. 1994).

181. *Id.* at 910.

182. *Id.*

183. *Id.* at 913.

184. *Id.* at 910.

185. *Id.*

186. *Id.*

filed a motion for partial summary judgment on the basis that dependent next of kin were not eligible to recover emotional damages.¹⁸⁷ For purposes of the appeal, Wiersma Trucking conceded that Dallis's mother was a dependent next of kin.¹⁸⁸

The court noted that because wrongful death actions had no basis in the common law and were purely statutory, such actions should be strictly construed.¹⁸⁹ In analyzing the Wrongful Death Statute, the court observed that the statute had three classes of beneficiaries.¹⁹⁰ "The first class includes spouses and dependent children, the second includes all other dependent next of kin, and the third includes death creditors."¹⁹¹ Wiersma Trucking attempted to argue that the second class was not supposed to be treated the same as the first class.¹⁹² In support of that position, it relied upon *Miller v. Mayberry*,¹⁹³ a case interpreting the Indiana Children's Wrongful Death Statute.¹⁹⁴ In *Miller*, the court held that emotional damages such as "loss of love and affection, mutual society and companionship were not proper damages" under the statute.¹⁹⁵ However, the *Wiersma Trucking* court noted that the General Assembly amended the statute to include such damages after the *Miller* decision.¹⁹⁶ In addition the *Wiersma Trucking* court did "not find *Miller* to be controlling because the two statutes contemplate different and distinct actions."¹⁹⁷ The basis of the Children's Wrongful Death Statute¹⁹⁸ is vested in property law.¹⁹⁹ The Wrongful Death Statute, however, is based "upon a pecuniary interest in the life of the decedent and not on a property right."²⁰⁰

The court also rejected Wiersma Trucking's argument that public policy dictated that the next of kin not be allowed to recover emotional damages in wrongful death actions.²⁰¹ The company argued that such awards "are intangible losses that can never be wholly compensated by money" and "the nature of the loss makes quantifying these damages difficult" for a jury.²⁰² In rejecting these arguments, the court noted that these hurdles are also faced by the first class of beneficiaries (spouses and dependent children) and were "artificial distinctions."²⁰³ In addition, to recover under the Wrongful Death Statute, the next of kin had to prove their dependency on the decedent, which could be a difficult

187. *Id.*

188. *Id.*

189. *Id.* at 911.

190. *Id.*

191. *Id.*

192. *Id.*

193. 506 N.E.2d 7 (Ind. 1987).

194. IND. CODE § 34-1-1-8 (1993).

195. *Wiersma Trucking*, 643 N.E.2d at 912 (citing *Miller*, 506 N.E.2d at 11).

196. *Id.*

197. *Id.*

198. IND. CODE § 34-1-1-2 (1993).

199. *Wiersma Trucking*, 643 N.E.2d at 912 (citing *Siebeking v. Ford*, 148 N.E.2d 194, 206 (Ind. Ct. App. 1958)).

200. *Id.* (citing *Siebeking*, 148 N.E.2d at 207).

201. *Id.*

202. *Id.*

203. *Id.*

proof.²⁰⁴ Because the statute does not seem to differentiate between the first two classes, the court held that dependent next of kin could recover for emotional damages.²⁰⁵

C. Attorney Right of Reliance/Attorney Bad Faith

On November 28, 1994, in *Fire Insurance Exchange v. Bell*,²⁰⁶ the Indiana Supreme Court addressed the issue of whether a party who is represented by counsel has the right to rely on representations allegedly made by opposing counsel and representatives of an insurance company during settlement negotiations, and whether such misrepresentations during settlement negotiations can create a private right of action. On May 28, 1985, a fire occurred at the home of Joseph Moore. Mr. Moore's grandson, Jason Bell, was seriously injured in this fire. Moore had a homeowner's insurance policy with a liability limit of \$300,000. Jason's mother and guardian hired an attorney to represent their interests in a claim asserted against Moore. In the ensuing months, Jason's attorney communicated with defense counsel and the insurance company claims' adjuster regarding Moore's policy limits. According to Jason's counsel, they represented that the liability limit of Moore's policy was \$100,000. Jason settled the claim for \$100,000. Jason's counsel later learned that Moore's insurance policy actually had a liability limit of \$300,000, and filed a complaint against the insurance company, the law firm representing the insured, and the attorney individually, on a theory of fraudulent misrepresentation.²⁰⁷

The defendants sought summary judgment on the grounds that the plaintiffs could not recover on a claim of fraud because they had no right to rely on any representations made, and the element of reliance is an essential component of any fraud claim.²⁰⁸ They argued that because Bell was represented by counsel who was a trained and licensed professional engaged in adversarial settlement negotiations, and also had independent access to policy limits through other means such as discovery, she had no right to rely on any such alleged misrepresentations.²⁰⁹

The trial court denied the motion for summary judgment stating that the issue of reliance was a question of fact.²¹⁰ The defendants then filed an interlocutory appeal, which was certified by the trial and appellate courts.²¹¹ The Indiana Court of Appeals affirmed the decision of the trial court and essentially adopted its reasoning. The court concluded that legal counsel for personal injury plaintiffs must exercise reasonable diligence in independently ascertaining information such as policy limits, but whether counsel has a right to rely on another's representation depends largely upon the facts of a particular case.²¹²

204. *Id.* at 913.

205. *Id.*

206. 643 N.E.2d 310 (Ind. 1994).

207. *Id.* at 311-12.

208. *Id.* at 312.

209. *Id.* at 312-13.

210. *Id.* at 311.

211. *Id.*

212. *Id.* See *Fire Ins. Exch. v. Bell*, 634 N.E.2d 517 (Ind. Ct. App. 1994), *aff'd in part, vacated in part*, 643 N.E.2d 310 (Ind. 1994).

The defendants then sought transfer to the Indiana Supreme Court.²¹³ The court granted transfer and affirmed the decisions of the trial and appellate courts, albeit on a broader ground. As to the contentions of the defendant insurance company, the supreme court summarily affirmed the decision of the Indiana Court of Appeals, citing with approval the cases discussed by the appellate court.²¹⁴ Regarding the claim against the opposing attorney and his law firm, the supreme court held that Jason's attorney had a right to rely on the representations of opposing counsel as a matter of law.²¹⁵ In reaching its decision, the court cited the ethical duties of a lawyer to tell the truth required by the Indiana Constitution, the Indiana Oath of Attorneys, the Indiana Rules of Professional Responsibility, the Preamble of the Standards for Professional Conduct Within the Seventh Judicial Circuit, the Indianapolis Bar Associations Tenants of Professional Courtesy and the International Association of Defense Counsel.²¹⁶

This decision appears to be geared more toward improving the reputation of the legal community than insuring that settlements are fairly reached. Moreover, the broadness of the court's language may create a slippery slope by creating new causes of action. As noted by the defendants in this case, the plaintiff could certainly have requested the liability limits of the insurance policy through discovery.²¹⁷ It is hard to believe that any prudent attorney would settle a case based on an opposing counsel's representations of policy limits without verifying the limits under the insurance policy.

Moreover, this case could open the door to all types of subsequent challenges to settlement agreements, which would be detrimental to both plaintiffs and defendants. Nothing in the court's language specifically limits this cause of action under a theory of fraudulent misrepresentations of insurance policy limits. In fact, the Supreme Court specifically held that "Bell's attorney's right to rely upon *any material* misrepresentations that may have been made by opposing counsel is established as a matter of law."²¹⁸ Therefore, any type of "puffing" in the course of settlement negotiations may make a party susceptible to a subsequent cause of action based on fraud under the Indiana Supreme Court's ruling. The opinion does not even limit the actionable misrepresentation to settlements. Thus, presumably, any type of communication that occurs in the context of litigation could give rise to subsequent legal action. Such a theory could certainly be taken to absurd results, and may affect the finality of settlements.²¹⁹

213. *Bell*, 643 N.E.2d at 311.

214. *Id.* at 312. See *Carrell v. Ellingwood*, 423 N.E.2d 630 (Ind. Ct. App. 1981); *Neff v. Indiana State Univ. Bd. of Trustees*, 538 N.E.2d 255 (Ind. Ct. App. 1989).

215. *Bell*, 643 N.E.2d at 313.

216. *Id.* at 312-13.

217. See IND. R. TRIAL P. 26(B)(2).

218. *Bell*, 643 N.E.2d at 313 (emphasis added).

219. Both counsel for plaintiffs and defendants could (and, likely, would) be the subject of such ancillary litigation. For example, a defendant's counsel who represented that his client would pay no more than "X" amount to settle a claim could be subsequently sued if it were discovered that his or her client had not explicitly set such a settlement ceiling. Conversely, a plaintiff's attorney who represented that his or her client had received permanent injuries could be sued to recoup all or part of the settlement if the client later recovered, at least to some degree, from those injuries.

This case could potentially create a cottage industry of subsequent attorney bad faith claims, remove any hopes of finality of judgments or settlements, and lengthen, rather than streamline, an already lengthy civil litigation process. Hopefully, the Indiana Supreme Court will realize the potential adverse ramifications of such a broad interpretation, and will limit fraud theories to "hard"—easily proved or disproved—misrepresentations, such as policy limits.

*D. Exclusive Remedy Provisions of the Worker's Compensation Act
and the Occupational Diseases Act*

During the current Survey period, the supreme court had the opportunity to clear the muddy waters surrounding the question of whether the exclusive remedy provisions of the Worker's Compensation Act (WCA)²²⁰ and the Occupational Diseases Act (ODA)²²¹ applied to intentional torts. In *Baker v. Westinghouse Electric Corp.*,²²² the United States District Court for the Southern District of Indiana certified those questions to the supreme court.²²³

The court first addressed the WCA.

The exclusivity section of the Indiana Worker's Compensation Act provides that the rights and remedies granted to the employee by the act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee, his personal representatives, dependents or next of kin, at common law or otherwise, on account of such injury or death . . .²²⁴

Earlier case law had interpreted the term "by accident" to be a "mens rea requirement," rather than a causation element.²²⁵ The supreme court held in a 1986 decision that "by accident" meant "an injury not intended or expected by the sufferer."²²⁶ There was some confusion among the lower courts after this decision concerning the intentions of the employer.²²⁷ Some courts resolved this confusion by applying "an 'intentional tort' exception to the exclusivity provision," which stated that the Act did not apply to situations where "an employer intentionally injures an employee."²²⁸ Causing even further confusion among the courts, the Seventh Circuit determined that the Indiana Supreme Court would eventually reject this exception and prevented the district courts from applying the exception.²²⁹ Thus, case results differed between the federal courts and state

220. IND. CODE § 22-3-2-6 (1993).

221. *Id.* § 22-3-7-6.

222. 637 N.E.2d 1271 (Ind. 1994).

223. *Id.* at 1272.

224. *Id.* (quoting IND. CODE ANN. § 22-3-2-6 (West Supp. 1992)). The court noted that "[t]his section has been amended since this suit commenced in federal court. . . . The changes made since 1992 do not alter the statute's substance." *Id.*

225. *Id.* (referring to *Indian Creek Coal & Mining v. Calvert*, 119 N.E. 519, 528 (Ind. App. 1918) (Dausman, J., dissenting)).

226. *Id.* (citing *Evans v. Yankeetown Dock*, 491 N.E.2d 969, 974-75 (Ind. 1986)).

227. *Id.* at 1273.

228. *Id.* (quoting *National Can Corp. v. Jovanovich*, 503 N.E.2d 1224, 1232 (Ind. Ct. App. 1987)).

229. *Id.* at 1273 n.2 (citing *Buford v. American Tel. & Tel. Co.*, 881 F.2d 432 (7th Cir. 1989)).

appellate courts.²³⁰ The supreme court finally ended that dispute by rejecting the “intentional tort exception” and holding that intentional torts were outside the scope of the Act’s coverage.²³¹ “Because we believe an injury occurs ‘by accident’ only when it is intended by neither the employee nor the employer, the intentional torts of an employer are necessarily beyond the pale of the act.”²³²

This interpretation fits with the purposes and intent of the WCA.²³³ One of the primary bases of the Act is the predictability of liability for the employer and the ability of the employer to factor that liability into its costs.²³⁴ Excluding an employer’s intentional torts does not undermine this system because “[a]n employer can avoid liability for intentional torts by refraining from egregious behavior—a decision over which it has complete control.”²³⁵

Finally, with regard to the WCA, the court looked at the level of intent required for an “‘intent’ to harm” and who must have that intent.²³⁶ The court determined that only a “deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice.”²³⁷ To hold otherwise would present the risk that the Act and its regulatory scheme would be “swallowed up” by outside suits.²³⁸ In addition, the intent must be the employer’s intent rather than that of a supervisor or other employee.²³⁹ Otherwise, the employer would be exposed to “uncertain liability for acts over which it has only tenuous control and, in doing so, would compromise the predictability so central to the act.”²⁴⁰

The court next looked to the ODA and determined that it barred outside actions for intentional torts.²⁴¹ The major difference the court found between the ODA and the WCA was that the ODA substituted the terms “by occupational disease” for “by accident.”²⁴² The court interpreted that language to relate “to the causal connection between employment and injury and not to state of mind as does the ‘by accident’ requirement.”²⁴³ The court concluded that the General Assembly intended that injuries falling under the ODA would only be compensated under its regulatory scheme, regardless of whether those injuries were intentionally inflicted or not.²⁴⁴

This decision appears to open a new avenue of recovery to plaintiffs injured at work. However, the exception is a narrow one, as it should be, considering the extensive

230. *Id.*

231. *Id.* at 1273.

232. *Id.*

233. *Id.*

234. *Id.* at 1274.

235. *Id.*

236. *Id.*

237. *Id.* (footnote omitted).

238. *Id.* at 1275 (quoting *National Can Corp. v. Jovanovich*, 503 N.E.2d 1224, 1233 n.14 (Ind. Ct. App. 1987)).

239. *Id.* (footnote omitted).

240. *Id.*

241. *Id.* at 1272.

242. *Id.* at 1276.

243. *Id.*

244. *Id.*

regulatory scheme and intentions of the WCA. It does, however, keep an employer from hiding behind that regulatory shield for its own intentional acts.

E. Negligent Hiring of Independent Contractors

An issue still in dispute is whether Indiana recognizes the tort of negligent hiring of an independent contractor. In *Bagley v. Insight Communications Co.*,²⁴⁵ the Indiana Court of Appeals attempted to answer this question. The results were unclear.

In 1988, Richard Bagley was installing cable television with Sam Friend when Friend fell from a ladder, causing Bagley's head to be "driven into a ground rod," causing permanent brain damage. Bagley was an employee of Friend, an independent contractor hired by Crawford, another independent contractor, to assist in installing cable for Insight Communications Co. ("Insight"). Bagley's guardian brought suit against Insight, Crawford and Friend, alleging in part that Insight and Crawford negligently hired Friend and, thus, were responsible for his negligence in using the ladder.²⁴⁶

The court stated that normally a contractor "is not responsible for injuries to employees of its negligent independent subcontractors."²⁴⁷ While exceptions to that rule exist, Bagley argued the doctrine of negligent hiring of an independent contractor.²⁴⁸ After noting that the doctrine had received approval in several states, the court also noted that the Seventh Circuit Court of Appeals had held that Indiana had also adopted the doctrine.²⁴⁹ The basis of that holding was the court's decision in *Board of Commissioners of Wabash County v. Pearson*,²⁵⁰ where the plaintiffs brought suit against the county for hiring "incompetent contractors" who failed to repair a bridge properly.²⁵¹ In *Wabash*, the supreme court held:

If, as is here charged, the corporation knew when it employed persons to make the repairs that they were incompetent, it did not exercise ordinary care. A corporation charged with [a] duty . . . must select the proper means and persons to do the work, if by the exercise of ordinary care such a selection can be made. If, however, ordinary care is used in selecting suitable persons, and in requiring the persons selected to exercise their skill with reasonable prudence and diligence, the bridge still remains unsafe, there will be no liability.²⁵²

In further support of the proposition that Indiana had adopted the doctrine of negligent hiring of independent contractors, the court cited *Detrick v. Midwest Pipe & Steel, Inc.*,²⁵³

245. 623 N.E.2d 440 (Ind. Ct. App. 1993).

246. *Id.* at 442.

247. *Id.* at 443.

248. *Id.*

249. *Id.* (citing *Stone v. Pinkerton Farms, Inc.*, 741 F.2d 941 (7th Cir. 1984) and *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005 (7th Cir. 1982)).

250. 22 N.E. 134 (Ind. 1889).

251. *Bagley*, 623 N.E.2d at 443.

252. *Id.* (quoting *Wabash*, 22 N.E.2d at 135 (citations omitted)).

253. 598 N.E.2d 1074 (Ind. Ct. App. 1992).

in which the court concluded that Indiana had recognized the doctrine but that the plaintiff had not made the requisite showing of proximate cause.²⁵⁴

Even though Indiana recognizes the doctrine, the court held that Bagley did not make a showing that he would be entitled to relief.²⁵⁵ The doctrine is only applicable to injuries sustained by the general public and not to employees of either the contractor or an independent contractor.²⁵⁶ In addition, Bagley did not make a showing that Friend was incompetent other than the one instance of negligence at issue in the case.²⁵⁷ “[A] single incidence of negligence is insufficient to prove incompetence under the doctrine of the negligent hiring of an independent contractors.”²⁵⁸

Judge Hoffman wrote a concurring opinion, in which Judge Shields joined. The opinion disagreed with the conclusion that Indiana had recognized “the doctrine of negligent hiring of an independent contractor”²⁵⁹ and the characterization of the holding in *Wabash*²⁶⁰ as being an adoption of the doctrine.²⁶¹ Instead, the concurrence reasoned that *Wabash* actually fell within one of the five recognized exceptions to holding a contractor liable for the acts of an independent contractor.²⁶²

Because two of the three appellate judges only concurred in the result, the strength of the *Bagley* decision is doubtful. This case has been fully briefed and argued before the Indiana Supreme Court who will, hopefully, clarify the matter.

IV. PRACTICE POINTERS

A. Trial Rule 56 and Designation of Evidence

Effective January 1, 1991, the Indiana Supreme Court amended Trial Rule 56 to state as follows:

At the time of filing the motion or response, a party shall designate to the court all parts of pleadings, depositions, answers to interrogatories, admissions, matters of judicial notice, and any other matters on which it relies for purposes of the motion. A party opposing the motion shall also designate to the court each material issue of fact which that party asserts precludes entry of summary judgment and the evidence relevant thereto. The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.²⁶³

254. *Bagley*, 623 N.E.2d at 443-44 (citing *Detrick*, 598 N.E.2d 1074)).

255. *Id.* at 444.

256. *Id.* (citing *Ray v. Schneider*, 548 A.2d 461 (Conn. App. Ct. 1988) and *Payne v. Lee*, 686 F. Supp. 677, 679 (E.D. Tenn. 1988)).

257. *Id.*

258. *Id.* (citing *Sullivan v. St. Louis Station Assoc.*, 770 S.W.2d 352 (Mo. Ct. App. 1989)).

259. *Id.* at 445.

260. See *supra* notes 250-51 and accompanying text.

261. *Bagley*, 623 N.E.2d at 444.

262. *Id.*

263. IND. R. TRIAL P. 56(C).

The effect of those amendments was the subject of several appellate cases during the Survey period.²⁶⁴ Because of those amendments, the courts can now consider *only* the evidence and facts specifically designated by the parties when ruling on a motion for summary judgment.²⁶⁵ They cannot countenance any other evidence.²⁶⁶ The *Kissell* court set out the following requirements of a proper designation: “[A] proper designation consists of: (1) a list of the factual matters which are or are not in dispute, (2) supported by a specific designation to their location in the record, and (3) a brief synopsis of why those facts are material.”²⁶⁷ Simply designating an entire pleading, deposition, etc. does not fulfill those requirements.²⁶⁸

The strict interpretation of the Trial Rule 56(C) requirements has been subject to some criticism.²⁶⁹ However, as a matter of prudent practice, attorneys involved in summary judgment proceedings should designate all material as specifically as possible in their pleadings. Failing to do so could result in an adverse ruling despite the presence of evidence which would support a party’s contentions because the courts “cannot look beyond whatever evidence has been designated.”²⁷⁰

B. Residential Real Estate Sales Disclosure

In 1993 a new statute was enacted requiring the disclosure of property defects in transfers of residential real estate.²⁷¹ Real estate covered by this statute includes all residential real estate with four or less dwelling units.²⁷² The statute requires that an owner disclose the condition of the foundation, roof, structure, and other aspects of the house.²⁷³ After such disclosure, a buyer has two days within which to rescind the contract without liability for breach of contract.²⁷⁴ The owner of the property is then liable for any errors or failures to disclose that were within the owners actual knowledge or that were the result of the owner’s negligence in obtaining the information.²⁷⁵

264. *Dzvonar v. Interstate Glass Co.*, 631 N.E.2d 516 (Ind. Ct. App. 1994); *Kissell v. Vanes*, 629 N.E.2d 878 (Ind. Ct. App. 1994); and *Miller v. Monsanto Co.*, 626 N.E.2d 538 (Ind. Ct. App. 1993).

265. *Kissell*, 629 N.E.2d at 880 (citing *Midwest Commerce Banking Co. v. Livings*, 608 N.E.2d 1010, 1012 (Ind. Ct. App. 1993)).

266. *Id.*

267. *Id.* (citing *Pierce v. Bank One-Franklin, NA*, 618 N.E.2d 16, 19 (Ind. Ct. App. 1993)).

268. *Id.* (citing *Intelogic Trace Texcom v. Merchants Nat'l Bank*, 626 N.E.2d 839, 842 n.4 (Ind. Ct. App. 1993)).

269. See *Kissell*, 629 N.E.2d at 880-81 (Baker, J., concurring) (“[T]he majority erroneously holds form over substance in its application of Ind. Trial Rule 56(C).”).

270. *Miller v. Monsanto Co.*, 626 N.E.2d 538, 542 (Ind. Ct. App. 1993) (quoting *Midwest Commerce Banking Co. v. Livings*, 608 N.E.2d 1010, 1012 (Ind. Ct. App. 1993)). See also *Dzvonar v. Interstate Glass Co.*, 631 N.E.2d 516, 518 (Ind. Ct. App. 1994) (“The existence of a genuine issue of material fact shall not be ground for reversal on appeal unless such fact was designated to the trial court.”).

271. IND. CODE § 24-4.6-2-1 to -13 (1993).

272. IND. CODE § 24-4.6-2-1 (1993).

273. IND. CODE § 24-4.6-2-7 (1993).

274. IND. CODE § 24-4.6-2-13 (1993).

275. IND. CODE § 24-4.6-2-11 (1993).

To date, no cases have been reported concerning failures to disclose or negligence in disclosure. However, this statute could form the basis of future tort actions. Therefore, not only should attorneys who regularly deal in real estate transactions be familiar with this statute, any attorney involved in a case of defective property should consider whether this statute creates any liability on the part of the seller of the property.

RECENT DEVELOPMENTS IN INDIANA COMMERCIAL LAW

HAROLD GREENBERG*

I. THE TANK OF UCC § 2-207 GETS CAUGHT IN THE INDIANA SAND¹

The leading writers on the Uniform Commercial Code have described section 2-207, the section that tries to deal with the so-called “battle of the forms,” as a tank designed for the swamp and “sent to fight in the desert.”² Another scholar described the section as “a miserable, bungled, patched-up job.”³ One of the more prolific writers on section 2-207

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1. Indiana’s version of UCC § 2-207 (1977) appears at IND. CODE § 26-1-2-207 (1993). The UCC, in its entirety, is located in IND. CODE § 26-1 (1993). Hereafter, citations to the various UCC sections will be to the generic section numbers of the current Official Draft unless the Indiana version differs in some material respect from the text of that draft.

UCC Section 2-207 states:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

- (a) The offer expressly limits acceptance to the terms of the offer;
- (b) They materially alter it; or
- (c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of [the Code].

2. 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3 at 29 (3d, Practitioner’s ed. 1988) [hereinafter WHITE & SUMMERS].

White & Summers published single volume editions of their work on the UCC in 1972 and 1980. In 1988, their third edition took two forms, an abridged Student Edition in green binding and a more expansive, two-volume Practitioner’s Edition in dark red binding (since expanded to several volumes). In some chapters, the Practitioner’s Edition contains more extensive textual discussions and footnote citations than does the Student Edition and is supplemented periodically. *Id.* at Preface. In this Article, unless the edition is specified, citation to WHITE & SUMMERS will be to the Practitioner’s Edition of 1988.

3. Letter from Grant Gilmore to Robert S. Summers, reproduced in RICHARD E. SPEIDEL ET AL., COMMERCIAL LAW 467 (4th ed. 1987). The section has also been described as “a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair,” Reaction Molding Tech., Inc. v. General Elec. Co., 585 F. Supp. 1097, 1104 (E.D. Pa. 1984), *modified*, 588 F. Supp. 1280 (E.D. Pa. 1984); and, a “murky bit of prose,” Southwest Eng’g Co. v. Martin Tractor Co., 473 P.2d 18, 25 (Kan. 1970). As stated by Professors Baird and Weisberg, “[M]ost commentators also agree that 2-207 is a statutory disaster whose every word invites problems in construction.” Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of*

has characterized the state of the law as "chaos."⁴ He explained that section 2-207 was part of "the Article 2 revolution" aimed at determining the true intent of the parties in reaching their agreement as based on facts, not on technical rules, and on determining when, based on the parties' own understandings, they intended that their deal be considered closed.⁵ He later stated that much of the blame for the chaos "had to be laid at the feet of courts committed to vested notions of classical contract law and with virtually no understanding of the underlying philosophy of the radically new Article 2."⁶

Section 2-207 was designed to abolish the mechanical common law "mirror image" rule pursuant to which the response to an offer that varied from the terms of that offer in any respect constituted a counter-offer rather than an acceptance.⁷ The drafters were concerned with four basic situations: (1) an offer followed by a qualified acceptance that looks like an acceptance but contains terms additional to or different from those in the offer; (2) the form offer with its own pre-printed terms to which the offeree responds by using a pre-printed form on which the dictated or negotiated terms are correctly typed or written, but the response form also contains pre-printed boilerplate terms that add to or differ from the terms contained in the offer; (3) the confirmation of a prior oral agreement that adds terms to or differs from the terms of that prior agreement; and (4) the failure of the forms to create a contract but the parties nevertheless act as if there is a contract.⁸ The two key issues to be resolved by application of section 2-207 to these situations are: (1) whether a contract exists and (2) if so, what its terms are.

the Forms: A Reassessment of § 2-207, 68 VA. L. REV. 1217, 1224 (1982).

4. John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1308 (1986) [hereinafter Murray, *Chaos*]. Dean Murray has written extensively on this topic, e.g., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1464-81 (1994) [hereinafter Murray, *Romancing the Prism*]; *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337 (1986); *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1 (1981) [hereinafter Murray, *The Article 2 Prism*]; *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITTS. L. REV. 597 (1978); *Intention over Terms: An Exploration of U.C.C. Section 2-207 and New Section 60, Restatement of Contracts*, 37 FORDHAM L. REV. 317 (1969). The "chaos" of § 2-207 has resulted in extensive commentary by other scholars as well. See, e.g., Baird & Weisberg, *supra* note 3; Caroline N. Brown, *Restoring Peace in the Battle of the Forms: A Framework for Making Uniform Commercial Code Section 2-207 Work*, 69 N.C. L. REV. 893 (1991); Daniel A. Levin & Ellen B. Rupert, *Beyond U.C.C. Section 2-207: Should Professor Murray's Proposed Revision be Adopted?*, 11 J.L. & COM. 175 (1992).

5. See Murray, *Chaos*, *supra* note 4, at 1311-12; Murray, *The Article 2 Prism*, *supra* note 4.

6. Murray, *Romancing the Prism*, *supra* note 4, at 1464. With respect to his and the efforts of others to explain the new philosophy of § 2-207, Dean Murray commented, "The courts just didn't get it and were never going to get it." *Id.*

7. See, e.g., *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571, 575 (Ind. Ct. App. 1978); *SALES & BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE* 3 U.C.C. Rep. Serv. (MB), § 3.02 [hereinafter *SALES & BULK TRANSFERS*]; 1 WHITE & SUMMERS, *supra* note 2, § 1-3 at 30; Richard E. Speidel, *Contract Formation and Modification under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1322 (1994).

8. See, e.g., UCC § 2-207, cmt. 1; Murray, *Chaos*, *supra* note 4, at 1307-08, 1315; John D. Wladis, *U.C.C. Section 2-207: The Drafting History*, 49 BUS. LAW. 1029, 1035 (1994).

A recent decision involving Indiana law has added to the chaos because of its approach to section 2-207 and its reliance on an earlier, seriously flawed Indiana decision. That latter decision itself relied on the most criticized of all section 2-207 decisions. The cases are, respectively, *Kittle v. Newell Coach Corp.*,⁹ *Continental Grain Co. v. Followell*,¹⁰ and *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*¹¹ The actual results with respect to liability for breach of contract in the *Kittle* and *Followell* cases may be justifiable, but the means by which those results were achieved will surely cause further confusion with respect to the application of section 2-207.

The Code's philosophy is that the issues of whether a contract exists, and, if so, what its terms are, depend entirely on the actual intention of the parties. Accordingly, section 2-207 cases are fact-sensitive. Proper analysis of those cases requires a somewhat extended discussion of their particular facts. The two Indiana cases, *Kittle* and *Followell*, are no different.

Kittle did not involve an exchange of pre-printed forms. The offer and subsequent dealings were contained in letters between the parties. The buyer offered to buy a motor coach on terms calling for twenty percent with the order, seventy-five percent of the balance on delivery, and the remainder of the balance after thirty days.¹² The seller's letter of response stated that the offer was acceptable but added a "clarification" that called for a non-interest bearing, thirty-day promissory note for the remainder of the balance on delivery of the motor coach. The seller could then discount the note at its bank.¹³ The buyer did not sign the copy sent by the seller but did send a reply that he

9. 830 F. Supp. 1209 (S.D. Ind. 1993).

10. 475 N.E.2d 318 (Ind. Ct. App. 1985).

11. 297 F.2d 497 (1st Cir. 1962).

12. The buyer's offer letter stated:

"I will pay 20% with my order; or \$62,378; and I will pay 75% of the remainder; or \$197,134 plus sales tax of \$8,750 upon delivery and acceptance; and I will pay the *balance*; or \$62,379 on the 30th day following delivery and my acceptance for a sale price total of \$311,811 plus \$8,750 of Indiana Sales Tax."

830 F. Supp. at 1210.

13. The seller's response, dated May 21, 1991, stated, *inter alia*:

The proposal contained in your letter of May 16, 1991 is acceptable to Newell Coach. I would like to offer the following clarifications:

-
- With the exception of the above clarifications regarding sales tax collection, the payment terms you offer are accepted. We will confirm the balance due at delivery, \$62,379, using a note which will bear no interest for 30 days, secured by the coach. I will discount the note to my bank who has already approved the transaction without requiring any additional documentation, financial statements, etc. from you.

We will proceed with the coach modifications immediately. Unless we run into some unforeseen delay in receiving materials, the delivery date target between June 20 and June 28 is reasonable. All things said and done, we are pleased to go forward with this transaction with you. . . . Your offer is acceptable because of current market conditions and our desire to maintain market share in a very competitive market, plus the personal desire to capture you and Ron as customers.

Please confirm your acceptance by signing below and transmitting a copy back to me. Unless you

would "just pay as [he] stated earlier" and would give the deposit check to the seller in person.¹⁴ The seller sent a response via fax indicating that personal delivery of the deposit check was "fine."¹⁵ Additional correspondence between the parties themselves as well as with the seller's bank concerned the financing of the purchase price, the use of the note for the payment of the balance due, and ultimately, the return of three cartons of clothing and linens sent by the buyer for placement in the coach prior to delivery.¹⁶ Because the buyer refused to execute the note, the seller refused to deliver the coach. The buyer then sued to recover his deposit, interest, and contractual and punitive damages.¹⁷ On motions by both parties for summary judgment, the court held that no contract existed and that the buyer was entitled to the return of his deposit.¹⁸

Analyzing *Kittle* properly requires an examination of its approach to section 2-207 and that of the *Followell* case on which it relied, both of which this author believes were flawed. In the course of doing so, it will also be helpful to explain how the courts should have proceeded in both cases.

At the very outset of its analysis of the section 2-207 problem, the *Kittle* court declared, "Without question, [the seller] made a 'definite and seasonable expression of acceptance' in his reply letter to [the buyer]'s offer. Thus, the only issue is whether [the

prefer the use [of] a wire transfer, I suggest [that] the deposit be sent to us by regular mail, a company check or personal check being perfectly satisfactory of course."

Deposition Ex. 66, Fax from Karl Blade, President, Newell Coach Corp. to James L. Kittle, Sr. (May 21, 1991). Copies of the exhibits were obtained from the record on file in Cause No. IP-91-915 C with the Clerk of the U.S. District Court for the Southern District of Indiana and are on file with the author.

14. The buyer's response, dated May 22, 1991, with a postscript dated May 23, sent via fax, stated, inter alia:

[I]n responding to your letter I believe we mutually understand both the "tax issue" you raised and the final payment methodology. [The next portions related to the interior decoration of the coach.]

....

[A]s agreed I am enclosing my check for \$62,378 as my deposit; and, at this point, I believe I will just pay as I stated earlier. However Coopers and Lybrand, my accounting firm, seem to believe I should be looking for "interest charge [offs]" inasmuch as I have none at this time therefore, let's leave this "open" 'til I make the decision.

... 'til Sunday then I am,

The post-script stated: "Karl . . . this being Thursday I am holding my check and will give it to you personally on Sunday." Deposition Ex. 25, Fax from James L. Kittle, Sr. to Karl Blade, President, Newell Coach Co. (May 23, 1991). *See supra* note 13.

15. The deposition exhibit quoted in *supra* note 14 indicates on its face that the seller responded by faxing a copy of the buyer's fax with some notations next to the decorative requests, the word "fine" next to the buyer's post-script about the check, and the addition, "See you Sunday, Karl."

16. Miscellaneous Deposition Exhibits, Correspondence (and notations apparently returned by fax) (June 5, June 21, June 27, July 2, July 2, July 3, July 5, and July 5) [hereinafter Miscellaneous Deposition Exhibits]. *See supra* note 13.

17. 830 F. Supp. at 1211.

18. *Id.* at 1210.

seller]’s acceptance was conditional on [the buyer]’s assent to additional terms.”¹⁹ It is here that the court, by following the map drawn in *Followell*, got lost in the desert and trapped in the sand.

Relying on the language of *Followell*, the *Kittle* court reasoned that the seller’s “clarification” changed a material term of the buyer’s offer, thereby making the seller’s acceptance “expressly conditional” on the buyer’s assent. This brought the response within the “unless clause” or proviso of section 2-207(1), thereby precluding the creation of a contract without that assent.²⁰ The problem is that *Followell* was seriously flawed both in its approach to the philosophy of section 2-207 and in its application of section 2-207 to the facts before it. Moreover, on its facts, *Followell* was inapplicable to *Kittle*.

In *Continental Grain Co. v. Followell*,²¹ a telephone conversation between the farmer-seller (“Followell”) and the grain company-buyer (“Continental”) in March 1983, resulted in a detailed oral agreement for the sale of corn and soybeans to Continental. One term of the agreement called for delivery in the fall at Continental’s elevator in Evansville, Indiana.²² Shortly thereafter, Continental sent two pre-printed forms entitled “Purchaser Confirmation,” each of which was completed so as to confirm on the front all of the terms of the oral agreement—specifically the Evansville delivery—and contained the pre-printed language, “Subject to the terms and conditions on back hereof.” On the reverse side were eleven pre-printed clauses, the most important of which said “6. Buyer reserves right to change destination of shipments. . . . 9. The terms expressed herein are the entire contract between the parties. No modification or amendment of the contract shall be valid or binding unless agreed to by both parties and confirmed in writing by either to the other.”²³ Followell immediately objected to clause six and requested an amendment specifying Evansville delivery. Continental’s representative agreed, but Continental, early in April, merely sent duplicates of the first documents with no change. Several telephone conversations about the delivery point followed. Only after a dramatic rise in the prices of corn and soybeans later that summer did Continental comply with Followell’s request and confirm an Evansville delivery term.²⁴ Followell never delivered the corn and soybeans, and Continental sued.²⁵ The trial court concluded that there was no contract between the parties, and the court of appeals affirmed.²⁶

19. *Id.* at 1211.

20. *Id.* at 1212.

21. 475 N.E.2d 318 (Ind. Ct. App. 1985).

22. The court opened its “STATEMENT OF THE FACTS.”

Followell, a Brown County farmer who had not previously dealt in grain futures, initiated a telephone call to an employee of Continental on March 14, 1983, *which resulted in an oral agreement* whereby he agreed to sell Continental 3000 bushels of corn at \$2.81 per bushel, and 2000 bushels of soy beans at \$6.01 per bushel, to be delivered September, October and November, 1983, at Continental’s elevator in Evansville, Indiana.

Id. at 319 (emphasis added).

23. *Id.* at 320.

24. *Id.*

25. *Id.*

26. *Id.* at 324.

The initial problem with the *Followell* court's opinion is that it confused two situations to which section 2-207 applies: (1) offers followed by responses that contain terms additional to or different from those in the offer, and (2) oral agreements followed by written confirmations that contain terms additional to or different from those to which the parties previously agreed orally. Although the court declared specifically that an oral agreement preceded Continental's confirmation form, its analysis was based on the premise that the facts involved an offer followed by a response that contained a differing term.²⁷ The case should have been analyzed solely as one involving an oral agreement followed by a written confirmation that contained a term different from those on which the parties had already agreed.

In the course of its opinion, the court quoted extensively from the White and Summers' discussion of section 2-207.²⁸ However, the court completely ignored the authors' fifth example: "Cases in which there is a prior oral agreement."²⁹ Commenting about one case in particular, White and Summers stated, "The court [in that case] correctly held that 2-207(1) does not permit confirmations to be expressly conditional on assent to additional or different terms. A party should not be able to break an oral contract through a confirmation."³⁰ Instead, the additional or different terms in confirmations of prior oral agreements are "run through [sections] 2-207(1) and (2)," and, if they differ materially from the oral agreement or one party objects to them, they do not become part of that agreement.³¹

Since the decision in *Followell*, White and Summers have suggested that if the form purportedly confirming a prior oral agreement actually continues the negotiation of a dickered term, the confirmation form "may not qualify as an acceptance under 2-207(1)."³² But neither they nor section 2-207(1) itself states what happens to the prior oral agreement if, under their analysis, the confirmation does not qualify as an acceptance. Does it make any difference with respect to the content or effectiveness of the prior oral agreement? Unless White and Summers are suggesting that the confirmation is evidence that no prior oral agreement actually existed, their comment is difficult to understand at best. The only reason a written confirmation may be necessary is to satisfy the Statute of Frauds found in section 2-201. However, it is not needed as an "acceptance" because a contract, albeit oral, already exists.³³ Murray suggests that a confirmation of an already existing oral agreement is treated as an acceptance under section 2-207(1) so that any terms in the confirmation that differ from or add to those of the oral agreement will be treated in the same manner as additional or different terms in acceptances pursuant to

27. *Id.* at 319, 321-24.

28. *Id.* at 322-23. The edition of WHITE & SUMMERS to which the court referred and from which it quoted is JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE (2d ed. 1980) [hereinafter WHITE & SUMMERS, 1980]. See the discussion of WHITE & SUMMERS, *supra* note 2.

29. WHITE & SUMMERS, 1980, *supra* note 28, § 1-2 at 26, 35-37.

30. *Id.* at 36 n.28 (referring to *American Parts Co. v. American Arbitration Ass'n.*, 154 N.W.2d 5 (Mich. Ct. App. 1967); *accord*, *Leonard Pevar Co. v. Evans Prod. Co.*, 524 F. Supp. 546 (D. Del. 1981)).

31. See UCC § 2-207(2)(a),(b); WHITE & SUMMERS, 1980, *supra* note 28, § 1-2 at 35.

32. WHITE & SUMMERS, *supra* note 2, § 1-3 n.71. The language quoted is followed by "Cf. *Continental Grain Co. v. Followell*." *Id.*

33. See 2 WILLIAM D. HAWKLAND, UNIFORM COMMERCIAL CODE SERIES § 2-207:05 (1992).

section 2-207(2).³⁴ This interpretation is consistent with White and Summers' observation that terms in confirmations are "run through" section 2-207(2), as noted *supra*.³⁵

In *Followell*, the court of appeals expressly found that the parties had reached a prior, detailed, oral agreement.³⁶ The confirmation form sent by Continental did not indicate that the parties were still dickering because the clause in question was pre-printed in a list of clauses on the back of the form. The only dickering resulted when Followell himself read the back of the form and objected.³⁷ At this point, the court should have ruled that a prior oral agreement called for delivery at Evansville and that the differing term in Continental's confirmation could not change the destination point without Followell's agreement. Even if treated as if it were an additional term, clause six of Continental's terms did not form part of their contract because one party objected to it pursuant to section 2-207(2)(a), or because it was a material alteration of the already-existing agreement of the parties pursuant to section 2-207(2)(b).³⁸

Continental's position that Followell had breached this contract by failing to deliver, however, would still have been tenuous at best. The court could have found that Continental was acting in bad faith when it continued to string Followell along until after a sudden price increase.³⁹ Alternatively, it could have found that Continental had failed to provide reasonable assurances of performance after being requested to do so, thereby repudiating the contract.⁴⁰ In either case, Followell's duty of performance would have been excused and the ultimate result the same, *i.e.*, that Followell was not in breach and therefore not liable to Continental.

Had *Followell* been analyzed in this way, it would not have been relevant to *Kittle* because there was no prior oral agreement in *Kittle*. Rather than follow what seems to be the appropriate analytical path, the *Followell* court said that section 2-207(1) "applies to written confirmations of oral contracts" and that "where confirmation differs materially, no contract is formed."⁴¹ It then proceeded to treat the case as if it involved an offer followed by a response that contained a term materially different from a term in that offer. In this part of the court's analysis, the second basic flaw appeared and ultimately misled the *Kittle* court.

The *Followell* court stated,

Here, the confirmation diverged so materially in item 6, which reserved Continental's right to change the place of destination, that if exercised by

34. JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 50 at 170 (3d ed. 1990).

35. See the discussion in the text accompanying *supra* note 31.

36. 475 N.E.2d at 319.

37. *Id.* at 320.

38. That the alteration was material can be found in Followell's objection, "[I]f I sign this, you can send me to Memphis, Tennessee or anywhere else you want me to go at my expense." *Id.* at 320.

39. See UCC § 1-203. The court intimated that Continental was not bargaining in good faith when it observed that Continental delayed from March 14 to July 29 before guaranteeing Evansville as the delivery destination and that it did not do so until after negotiations had ceased and prices had dramatically risen. 475 N.E.2d at 320.

40. See UCC § 2-609.

41. 475 N.E.2d at 322.

Continental, it could be ruinous to Followell. Item 6, accompanied by item 9, the insistence that Continental's terms and no others would be accepted, makes the acceptance expressly conditional, and thus no [section] 2-207(1) acceptance occurred.⁴²

The court misread "item 9" as making acceptance expressly conditional. "Item 9" is a traditionally worded "no-oral-modification" clause designed to meet the requirements of section 2-209(2) and to require that all subsequent changes in the contract be in writing.⁴³ As noted *infra*, it was not the kind of clause necessary to make the acceptance "expressly conditional."

The substantial majority of courts and scholars dealing with the issue of whether a particular clause in a response to an offer makes acceptance expressly conditional have concluded that the language must make absolutely clear to the offeror that no contract exists without the offeror's assent to the offeree's additional or different terms. This result is frequently achieved by tracking the language of section 2-207(1)'s proviso.⁴⁴ Anything less will not suffice. "Item 9" falls far short of this requirement, as does the statement at the bottom of the first page of Continental's confirmation, "Subject to the terms and conditions on the back hereof."⁴⁵

The next problem with the *Followell* decision is that, as the *Kittle* court correctly read it, the *Followell* court concluded that the different delivery term was so material an alteration of the agreement of the parties that it made the acceptance expressly conditional within the proviso of section 2-207(1).⁴⁶ In doing so, the *Followell* court relied on *Roto-Lith, Ltd. v. F.P. Bartlett Co.*,⁴⁷ a case almost universally criticized for its total misinterpretation and misapplication of section 2-207.⁴⁸

42. *Id.* at 324.

43. Section 2-209(2) states: "A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded . . ." Official Comment 3 thereto explains, "Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards any future modification of the contract by giving effect to a clause in a signed agreement which expressly requires any modification to be by a signed writing." Cf. Robert A. Hillman, *Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model*, 35 WM. & MARY L. REV. 1509 (1994).

44. See, e.g., *Step-Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 101-02 (3rd Cir. 1991); *C. Itoh & Co. (America) Inc. v. Jordan Int'l Co.*, 552 F.2d 1228 (7th Cir. 1977); *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1168 (6th Cir. 1972); *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571 (Ind. App. 1978); *Mace Indus., Inc. v. Paddock Pool Equip. Co.*, 339 S.E.2d 527, 530 (S.C. Ct. App. 1986); Murray, *Chaos*, *supra* note 4, at 1325, 1333, 1335.

45. *Followell*, 475 N.E.2d at 319. See, e.g., *Luria Bros. & Co. v. Pielet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103, 113 n.12 (7th Cir. 1979); *Dorton*, 453 F.2d at 1164.

46. *Followell*, 475 N.E.2d at 324.

47. 297 F.2d 497 (1st Cir. 1962).

48. See, e.g., *Luria Bros. & Co.*, 600 F.2d at 113; *C. Itoh & Co. (America)*, 552 F.2d at 1235 n.5; *Gardner Zemke Co. v. Dunham Bush, Inc.*, 850 P.2d 319, 323 (N.M. 1993) (*Roto-Lith* is an "aberration in Article 2 jurisprudence"); *Uniroyal, Inc.*, 380 N.E.2d 571; Murray, *Chaos*, *supra* note 4, at 1330-31 ("*Roto-Lith* was the product of a court so obsessed with the classical analytical framework that it arrived at a conclusion and a rationale diametrically opposed to the statutory language.").

Roto-Lith consisted of two basic parts: First, the court concluded that the presence of a pre-printed warranty disclaimer clause in the seller's acceptance form that materially altered the proposed contract "solely to the disadvantage of the offeror" made that acceptance expressly conditional within the proviso of section 2-207(1), thereby making the form a counter-offer to which the buyer never expressly agreed.⁴⁹ Second, the court ruled that the buyer's receipt, acceptance, and use of the goods constituted an acceptance of that counter-offer and of the warranty disclaimer found in it.⁵⁰ Both parts of *Roto-Lith* have been discredited by substantially all courts and scholars.

White and Summers, on whom the *Followell* court relied so heavily, described *Roto-Lith* as

the infamous case . . . where the First Circuit held that any responding document "which states a condition materially altering the obligation solely to the disadvantage of the offeror"—here, a disclaimer—was expressly conditional and thus did not operate as an acceptance. We would reject that argument also, for it is inconsistent with our interpretation of the word "acceptance" in 2-207(1) and contrary to the [drafters'] policy stated above to whittle down the counteroffer rule and form contracts more readily than under the common law. Further, Comment 4 to 2-207 refers to disclaimers as "material" alterations under 2-207(2)(b), a reference that would be redundant if disclaimers always made an offer expressly conditional under 2-207(1).⁵¹

The *Followell* court confused the two parts of section 2-207(1) when it said that the proviso "must be construed as imposing a limitation upon how much an acceptance can differ and still be considered an acceptance at all."⁵² In applying that section, the first inquiry should be whether the response constitutes a "reasonable expression of acceptance," which is the subject of the first part of the section. If it does, then it "operates as an acceptance." The issue in answering this question is whether the parties have indeed closed their deal or are still negotiating.⁵³ If the conclusion is that the parties intended to close the deal and that the offeree's response would ordinarily be an acceptance within the section despite the presence of additional or different terms, the next inquiry should be whether the offeree has indicated unequivocally that no deal exists

49. *Roto-Lith*, 297 F.2d at 500.

50. *Id.*

51. WHITE & SUMMERS, 1980, *supra* note 28, § 1-2 at 28. *Accord*, Step-Saver Data Sys., Inc. v. Wyse Technology, 939 F.2d 91, 101 (3rd Cir. 1991).

52. *Followell*, 475 N.E.2d at 322.

53. As stated by Duesenberg & King,

In every case, the "critical question to ask is, has the offeree expressed the notion that the deal is closed? If the offeree expressed the notion that the deal is closed, it is closed even though he has made some counterproposals to the original proposition. In each case a determination must be made to ascertain whether the counterproposals militate against a finding of an expression of a closed deal; but if the expression of a closed deal is found, both parties are bound by the contract, even though the offeree has stated terms materially different from those offered."

SALES & BULK TRANSFERS, *supra* note 7, § 3-04 at 3-7 (quoting WILLIAM D. HAWKLAND, 7 ILL. S.B.A. COMMERCE, BANKING & BANKRUPTCY NEWSLETTER 5 (1962)).

unless the offeror assents to all of the offeree's terms, as discussed *supra*.⁵⁴ If no clause in the offeree's response satisfies the strict requirements of the proviso, a contract has been formed despite the presence of additional or different terms in the response that constitute material differences from the terms in the offer. What happens to those additional or different terms is then to be determined by application of section 2-207(2).

The *Followell* court quoted again from White and Summers: "If the return document diverges significantly as to a dickered term, it cannot be a 2-207(1) acceptance."⁵⁵ It then continued with the authors' examples of forms that conflict as to price or delivery terms, with the offer stating one price and the acceptance stating another, or the offer stating "as is—where is" and the acceptance "F.O.B. our truck your plant loaded."⁵⁶ Earlier in their text, however, White and Summers stated: "It is easier to hold that a purported acceptance that includes a different delivery date (specifically written in) cannot operate as an acceptance than to hold that a different printed arbitration clause cannot."⁵⁷ This analysis focuses on whether the response is an expression of acceptance because the parties have completed their bargaining, not on whether the acceptance has been made expressly conditional.

Continuing with the analysis of *Followell* as an offer-acceptance case, the problem with the facts is that it appears that all dickering had ended when Continental typed the Evansville delivery point specified in *Followell*'s offer on the face of the confirmation form. The terms pre-printed on the back apparently had no part in the parties' negotiations or dickering. The mere fact that the dispute related to a term that is ordinarily a dickered term should not have ended the court's analysis as it did. Because the delivery term can be called a dickered term—the change was undickered boilerplate—the court should have more deeply examined the true intent of both parties. *Followell* was objecting, but the real question should have been whether, by using the boilerplate form, Continental was still dickering or merely had used an available form without any attention to its pre-printed boilerplate. A reasonable conclusion could be, and this author believes, that Continental had completed its bargaining when it filled in the confirmation form and that a contract was formed pursuant to section 2-207(1) notwithstanding the presence of item six on the reverse side of that form. From an extensive examination of the drafting history of section 2-207, one writer has concluded that very different terms in boilerplate do not prevent a printed form response from constituting an expression of acceptance.⁵⁸ If a contract was formed, whether item six thereafter became part of the contract under section 2-207(2) constituted a separate issue that should have been dealt with, as discussed *supra*,⁵⁹ and likely did not become part of the contract. In any event, it appears that a contract existed between the parties. Whether *Followell* was excused from performing, as the court found, was a separate issue, also as discussed *supra*.⁶⁰

54. See *supra* notes 44-45 and accompanying text.

55. *Followell*, 475 N.E.2d at 322 (quoting WHITE & SUMMERS, 1980, *supra* note 28, § 1-3 at 37).

56. *Id.*

57. WHITE & SUMMERS, 1980, *supra* note 28, § 1-2 at 28.

58. See Wladis, *Drafting History*, *supra* note 8, at 1046.

59. See *supra* notes 36-38 and accompanying text.

60. See *supra* notes 39-40 and accompanying text.

Returning to *Kittle*, it is this author's opinion that, in view of the problems with *Followell*, not the least of which are the application of offer-acceptance analysis to a confirmation-of-prior-oral-agreement case and the presence of boilerplate provisions not found in *Kittle*, the *Kittle* court should not have relied on it as controlling. The seller in *Kittle* stated that the buyer's offer was "acceptable," that "the payment terms . . . [were] accepted" "with the exception of the above clarifications," and that "[the buyer's] offer [was] acceptable because of current market conditions."⁶¹ The court concluded, "*Without question*, [the seller] made a 'definite and reasonable expression of acceptance' in his reply letter to [the buyer]'s offer."⁶² The seller's response did not state that it was expressly conditional nor did it clearly indicate that the seller would not proceed with the deal except on the seller's own terms. Therefore, the proviso of section 2-207(1) was not activated, and a contract could have resulted. If so, the different payment term should have been examined under section 2-207(2), and if, as the court indicated, the requirement of a promissory note was a material alteration,⁶³ it would not become part of the contract. Similarly, the buyer's reply that he would "just pay as [] stated earlier" was an objection to the seller's term, thereby precluding it from becoming part of the contract.⁶⁴ When the seller refused to deliver, he breached that contract.

Furthermore, the philosophy underlying the Uniform Commercial Code does not require that the parties agree to all material terms at the time the contract comes into existence. If the parties intend to reach agreement, a contract may exist despite the absence of one or more terms, which are for later agreement.⁶⁵ Thus, the court should also have examined closely whether the parties had formed a contract for the sale of the coach but left for later agreement the determination of how the payment of the final portion of the price would be made. In the event of a failure to agree, the Uniform Commercial Code would fill in any gaps.

Had the court approached section 2-207 as it should have, it would have determined initially whether or not the first response of the seller was indeed an expression of acceptance that closed the deal and resulted in a contract, or was a continuation of negotiations over the payment terms, thereby precluding the making of a contract at that point. The seller's response could have been classified as either "an acceptance which requests or suggests a modification of the contract" or "a 'grumbling assent' [that] has been described as an acceptance that expresses dissatisfaction at some terms 'but stops

61. 830 F. Supp. at 1210.

62. *Id.* at 1211 (emphasis added).

63. See *id.* at 1212. One may question whether the demand for a non-interest bearing 30-day promissory note was in fact materially different from the buyer's promise to pay the balance due at the end of 30 days. Since the bank to which the note would be negotiated was intimately involved in the transaction, it would not be a holder in due course. Consequently, the buyer's defenses in the event of problems with the coach would still have been available to him, which is why he wanted the 30 day deferral of final payment. Had problems occurred, in all likelihood he could have successfully refused to pay the balance whether the payment was to be made to the seller or to the bank. However, that discussion is for another day.

64. See § 2-207(2)(a).

65. Section 2-203(3) states: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

short of dissent.”⁶⁶ In either case there would have been a “seasonable expression of acceptance” that operated as an acceptance, and a contract would have resulted. If so, the promissory note request would then be subject to analysis under section 2-207(2) as noted above.⁶⁷

The examination of *Kittle* should not stop here. If the court could conclude (as it did) that no contract was formed when the seller responded to the buyer’s offer, the court should have examined all of the remaining dealings and communications between the parties. Any of these could have indicated that the parties had finally reached agreement. If the court then concluded that the parties were still negotiating and that no contract resulted from the exchange of all of the writings, the actual conduct of the parties should have been examined pursuant to section 2-207(3).

Section 2-207(3) states that “[c]onduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract.”⁶⁸ As the court noted in *Dorton v. Collins & Aikman Corp.*,⁶⁹

When no contract is recognized under Subsection 2-207(1) . . . the entire transaction aborts at this point. If, however, the subsequent conduct of the parties—particularly, performance by both parties under what they apparently believe to be a contract—recognizes the existence of a contract, under Subsection 2-207(3), such conduct by both parties is sufficient to establish a contract, notwithstanding the fact that no contract would have been recognized on the basis of their writings alone.⁷⁰

66. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 2-20 at 99 (3d ed. 1987); accord ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 84 (One vol. ed. 1952). With respect to the former type of acceptance, CALAMARI & PERILLO describe *Martindell v. Fiduciary Council, Inc.*, 26 A.2d 171 (N.J. Eq. 1942), *aff’d* 30 A.2d 281 (N.J. Eq. 1943), as illustrative:

In that case A gave B an option to purchase 27 shares of certain stock. Within the time specified in the option, the optionee wrote as follows: “I hereby exercise my option. I have deposited the purchase price with the Colorado National Bank to be delivered to you upon transfer of the stock. If you do not accept such procedure, I demand that you designate the time and place for the same.” The court held that there was an acceptance and that the language relating to how the purchase price would be paid did not give rise to a counter-offer because it merely suggested a way to perform the contract and the acceptance was otherwise unconditional.

CALAMARI & PERILLO, *supra* § 2-20 at 99 n.91.

67. According to Professor Wladis, the drafting history indicates Karl Llewellyn’s early position that in non-form offer and acceptance situations, *i.e.*, where pre-printed forms are not used by the parties, if the offeree’s response states both an acceptance and a term different from, rather than in addition to, a term in the offer, no contract exists. Wladis, *Drafting History*, *supra* note 8, at 1037. However, the language of § 2-207(1) as ultimately adopted does not appear to make this distinction or support this result.

68. See *supra* note 1.

69. 453 F.2d 1161 (6th Cir. 1972).

70. *Id.* at 1166. *Accord*, Leonard Pevar Co. v. Evans Prods. Co., 524 F. Supp. 546, 552 (D.Del. 1981); see, *Uniroyal, Inc. v. Chambers Gasket & Mfg. Co.*, 380 N.E.2d 571, 578 (Ind. Ct. App. 1978).

What conduct would be sufficient to recognize the existence of a contract is essentially a fact issue. Section 2-204(1), to which the official comment to section 2-207 refers,⁷¹ states, "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes existence of such a contract." The official comment thereto adds that "appropriate conduct by the parties may be sufficient to establish an agreement."⁷² Although the conduct of the parties in the majority of cases applying section 2-207(3) reached the point where the seller had shipped goods and there was a breakdown in the transaction thereafter,⁷³ actual shipment is not required.⁷⁴ The issue is: Notwithstanding the non-existence of a contract, did the parties nevertheless behave as if a contract did exist?

There is evidence from which the court could have concluded that the parties did act as if a contract existed in *Kittle*. The court should have reviewed that evidence and should have reached some conclusion based thereon. The buyer's reply to the seller's response raised a number of issues about interior decoration and stated that he would personally deliver the deposit check, which he apparently did.⁷⁵ The court observed that the seller interpreted the buyer's reply and check "as an acceptance of its clarifications,"⁷⁶ but the court did not state whether the seller was correct. The buyer's reply stated in response to the seller's clarification that the buyer would "just pay as [he had] stated earlier,"⁷⁷ thus rejecting the seller's clarification. Thereafter, further discussions about decorative changes to the interior of the motor home and discussions between the buyer and the seller's bank ensued.⁷⁸ The seller never returned the buyer's deposit check but apparently continued to prepare the motor home for delivery to the buyer by making the requested interior changes. The buyer sent clothing and linens to the seller for placement in the motor home.⁷⁹ Thus, at the point when the seller refused to deliver the motor home unless the buyer signed the promissory note, both parties had apparently continued to act as if a contract existed between them. Whether their conduct was sufficient to satisfy section 2-207(3) remained for the court to determine, a determination the court never made.

The end result in *Kittle*—that no contract existed and that the buyer was entitled to the return of his deposit—might have been correct. Then again, if the appropriate

71. Section 2-207 cmt. 7.

72. Section 2-204 cmt.

73. See, e.g., *Gumz v. Starke County Farm Bureau Coop. Ass'n*, 395 N.E.2d 257 (Ind. 1979), adopting in part *Gumz v. Starke County Farm Bureau Coop. Ass'n*, 383 N.E.2d 1061 (Ind. Ct. App. 1978); *Uniroyal, Inc.*, 380 N.E.2d 571.

74. See, e.g., *United States Indus., Inc. v. Semco Mfg., Inc.*, 562 F.2d 1061, 1067 n.8 (8th Cir. 1977) (seller refused to ship); *Reaction Molding Technologies, Inc. v. General Elec. Co.*, 585 F. Supp. 1097 (E.D. Pa. 1984) (buyer sent deposit check; seller prepared for production); *Cargill, Inc. v. Wilson*, 532 P.2d 988 (Mont. 1975) (seller received offer, made no objection; later received and objected to check as advance payment, but refused to deliver).

75. Deposition Exhibit 25, Fax from James L. Kittle, Sr. to Karl Blade, President, Newell Coach Co. (May 23, 1991). See *supra* note 13.

76. *Kittle*, 830 F. Supp. at 1211.

77. *Id.*

78. Miscellaneous Deposition Exhibits, *supra* note 16.

79. Miscellaneous Deposition Exhibits, *supra* note 16.

analytical steps had been followed, it might not have been. The real problem with the decision is that the path taken to reach its result may well misdirect future litigators and courts into the engulfing sands of section 2-207. It should be further noted that the sands of section 2-207 may be swept away by the revision of Article Two, which has been underway for several years under the auspices of the National Conference of Commissioners on Uniform State Laws.⁸⁰ However, several years, at least, may pass before any revision occurs. Meanwhile, beware of the sand.

II. NEW UCC ARTICLE 3 RESOLVES AN UNFAITHFUL EMPLOYEE PROBLEM AND CLARIFIES A CONVERSION PROBLEM⁸¹

Former section 3-405 of the UCC provided that if an employee of the drawer of a check supplied the drawer with the name of the payee *with the intention that the payee have no interest in the check*, anyone could endorse the check in the name of the payee and that endorsement would be effective, *i.e.*, would not be treated as a forgery. Thus, in *Hartford Insurance Co. v. Union Federal Savings Bank*,⁸² a panel of the court of appeals was divided on whether the requisite intention had been demonstrated so as to support summary judgment in favor of the bank defendants in a conversion action brought by the drawer's fidelity insurer.

In *Hartford*, a dishonest employee, who was authorized to submit check requests to her employer's accounting department, submitted check requests for payment to existing clients of her employer. When the accounting department sent the checks back to the employee for disbursement to the named payees, she forged the endorsements of the named payees and obtained the funds represented by the checks. The employer's employee fidelity insurance company paid the employer's claim and, standing in the shoes of the employer, brought conversion actions against the banks "that processed the checks."⁸³

80. See Symposium, *Ending the "Battle of the Forms": A Symposium on the Revision of Section 2-207 of the Uniform Commercial Code*, 49 BUS. L.W. 1019 (1994); Symposium, *The Revision of Article 2 of the Uniform Commercial Code*, 35 WM. & MARY L. REV. 1297 (1994). Gerald R. Bepko, Chancellor of Indiana University and member of the faculty at Indiana University School of Law—Indianapolis, is a member of the revision committee.

81. In 1992, the Indiana General Assembly adopted a new Article 3 of the UCC and substantially revised Article 4, which took effect July 1, 1994. Former Article 3 appeared at IND. CODE § 26-1-3 (1993). New Article 3 appears at IND. CODE § 26-1-3.1 (1993 & Supp. 1994). See Pub. L. No. 222-1993 § 5, 1993 Ind. Legis. Serv. 2364 (West); see generally Harold Greenberg, *The Law of Negotiable Instruments and Bank Collections Undergoes Major Changes: Indiana Replaces Article 3 and Updates Article 4 of the Uniform Commercial Code*, 27 IND. L. REV. 789 (1994). Hereafter, sections of former Article 3 will be cited using the generic form UCC § 3-xxx. Sections of new Article 3 will be cited UCC § 3.1-xxx.

82. 641 N.E.2d 32 (Ind. Ct. App. 1994).

83. *Id.* at 33. Because the facts occurred and the cause of action was filed prior to the effective date of new Article 3, § 3-419 applied although it was not cited nor discussed by the court. The new provision on conversion is § 3.1-420. As discussed in text at *infra* notes 89-90, there is some question as to whether the insurance company, acting for the drawer, had a cause of action against the banks for conversion.

Relying on two non-Indiana cases,⁸⁴ the plaintiff argued that section 3-405 does not apply when the checks are drawn to bona fide creditors who have submitted invoices on the theory that it is they who supply their names, not the faithless employee.⁸⁵ The court distinguished those cases because the plaintiff did not designate any evidence whatever to support the claim that the named payees were bona fide creditors who submitted invoices or requested payment. The court concluded, therefore, that since the language of the statute encompasses both real and fictitious payees when the employee intends them to have no interest in the checks, summary judgment was appropriate.⁸⁶ Judge Bartea, in her dissent, stated that issues of fact to be resolved included whether or not the employee had the requisite intent when she supplied the names.⁸⁷

One problem that arose from the language of former section 3-405 and is evidenced by the opinions in *Hartford* is that where real, as opposed to fictitious, payees were involved, whether the forged endorsements were nonetheless effective could turn on the precise moment at which the faithless employee decided to appropriate the checks. If she had decided to take the checks before she submitted the names of the payees, the endorsements would be effective notwithstanding the forgeries. If she did not decide to take the checks until after they were signed, the forged endorsements would not be effective.

New section 3.1-405 places the loss resulting from the conduct of dishonest employees who have "responsibility" with respect to checks directly on the employer. If an employer entrusts an employee with responsibility for checks, that employee's fraudulent endorsement is effective. "Responsibility" includes the duty "to supply information determining the names . . . of payees" and "to control the disposition of instruments to be issued in the name of the employer."⁸⁸ Whether the employee forms her intent to take the checks before or after they are issued is irrelevant. The disagreement in *Hartford* is now moot.

An issue not mentioned in the court's opinion and apparently not raised in the trial court is whether the insurance company, standing in the shoes of the drawer of the checks, had a cause of action for conversion in the first instance. Under former section 3-419, courts were divided on whether the drawer had a conversion action because the drawer, technically, never owned the obligation represented by the check. The obligation and the check itself were the property of the payee.⁸⁹

Section 3.1-420 of new Article Three plainly states that an action in conversion may not be brought either by the issuer of the check or a payee who did not receive delivery.⁹⁰ In *Hartford*, whether applying the old or new version of Article Three, the appropriate action would have been an action by the employer who drew the checks against the

84. See *Snug Harbor Realty Co. v. First Nat'l Bank*, 253 A.2d 581 (N.J. Super. Ct. 1969), and *Danje Fabrics Div. v. Morgan Guaranty Trust Co.*, 409 N.Y.S.2d 565 (N.Y. App. Div. 1978).

85. *Hartford Ins. Co.*, 641 N.E.2d at 35.

86. *Id.*

87. *Id.*

88. UCC § 3.1-405(a)(3)(iv), (v).

89. See UCC § 3.1-420, cmt. 1; *Stone & Webster Eng'g Corp. v. First Nat'l Bank*, 184 N.E.2d 358 (Mass. 1962).

90. UCC § 3.1-420(a).

drawee bank for the recredit of checks paid contrary to the drawer's instructions, *i.e.*, over forged endorsements. The drawee bank would then be able to defend itself with probable success under section 3-405 and with almost certain success under section 3.1-405 on the basis that the endorsements were effective and that the checks, therefore, had been properly paid notwithstanding the technical forgeries.

1994 SURVEY OF RECENT DEVELOPMENTS IN WORKER'S COMPENSATION

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INTRODUCTION

As the industrial revolution advanced during the late nineteenth century and production became the business of capital rather than the family unit, farmer, or artisan, injured workers and their families were devastated by industrial accidents. Workers had no guaranteed means of recovering medical expenses and lost wages resulting from work-related injuries. Injured workers could seldom prevail at common law, wherein traditional defenses such as assumption of risk and the fellow-servant doctrine applied. However, on the rare occasion that an employee could prevail in a lawsuit, the burden of a large civil judgment could devastate the employer.

Worker's compensation developed as a response to the need to protect employers from civil judgments and litigation and also to cover employees for medical expenses and lost wages, while mitigating the harsh results of the common law. Under worker's compensation, the common law defenses of assumption of risk and the fellow servant rule are unavailable to the employer, while remedies for pain and suffering and consequential damages are unavailable to the employee. Instead, injured employees receive prescribed compensation in the form of wage replacement schedules and medical benefits, employers are protected from civil liability, and the public is relieved from direct responsibility for those disabled in work-related accidents. Worker's compensation places the cost of these benefits on the consumer of the employer's product or service, through the medium of insurance.¹

The issue of fault is generally not relevant to a determination of compensability under the Indiana Worker's Compensation Act.² Thus, the employee may recover for accidental injuries where the employer is without fault. However, pursuant to section 22-3-2-6 of the Indiana Code, worker's compensation is the employee's exclusive remedy for injury or death by accident arising out of and in the course of employment.³ In other words, the employee may not bring a civil suit against an employer for personal injuries by accident arising out of and in the course of employment.

In Indiana, all employees and employers are bound to accept and pay compensation and medical benefits for "personal injury or death by accident arising out of and in the course of the employment."⁴ The employee is entitled to statutorily prescribed

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1. ARTHUR LARSON, *LARSON'S WORKMEN'S COMPENSATION*, § 1-1. (desk ed., 1989).
2. *Id.*
3. IND. CODE § 22-3-2-6 (1993).
4. *Id.* § 22-3-2-2.

compensation for lost wages,⁵ scheduled compensation for permanent impairment,⁶ and statutory medical benefits.⁷

If a dispute arises over the compensability of a claim, the employee is entitled to a hearing before a member of the Worker's Compensation Board.⁸ Hearing member decisions may be reviewed by the Full Worker's Compensation Board.⁹ Decisions of the Full Board may be reviewed by the Indiana Court of Appeals and the Indiana Supreme Court.¹⁰

The Occupational Diseases Act (ODA), also administered by the Worker's Compensation Board, provides rights and remedies nearly identical to those found in the Worker's Compensation Act to employees for "disablement or death by occupational disease arising out of and in the course of the employment."¹¹

I. EXCLUSIVITY CASES

A. Intentional Torts and the Exclusive Remedy Provision of the Worker's Compensation Act

On June 28, 1994, the Indiana Supreme Court handed down three decisions addressing the viability of intentional tort actions by employees against employers.¹² These decisions clarified the law as to when injured employees may pursue employers for civil damages, instead of seeking scheduled compensation under the Worker's Compensation Act.

1. *Baker v. Westinghouse*.—The leading case was *Baker v. Westinghouse Electric Corp.*,¹³ in which the United States District Court for the Southern District of Indiana certified questions of Indiana law under Appellate Rule 15(O) to the Indiana Supreme Court. In the federal action, former employees of Westinghouse Electric Corporation's operations in Bloomington and Muncie had brought a federal action alleging that exposure to toxic substances had caused neurological and central nervous system disorders.¹⁴ At issue was whether an "intentional tort exception" to the exclusivity provisions of the Worker's Compensation Act¹⁵ and ODA exists.¹⁶

The Indiana Court of Appeals had previously declared an "intentional tort exception" to the Worker's Compensation Act in *National Can Corp. v. Jovanovich*.¹⁷ In *National*

5. *Id.* §§ 22-3-3-7 to -9.

6. *Id.* § 22-3-3-10.

7. *Id.* §§ 22-3-3-4, -5.

8. *Id.* § 22-3-4-5.

9. *Id.* § 22-3-4-7.

10. *Id.* § 22-3-4-8.

11. *Id.* § 22-3-7-2.

12. See *supra* text accompanying note 2.

13. 637 N.E.2d 1271 (Ind. 1994).

14. Barb Albert, *Court Makes It Easier for Injured Workers to Sue*, INDIANAPOLIS STAR, June 29, 1994, at B5.

15. IND. CODE § 22-3-2-6 (1993).

16. *Id.* § 22-3-7-6.

17. 503 N.E.2d 1224 (Ind. Ct. App. 1987), *overruled by Baker*, 637 N.E.2d 1271.

Can, the court held that “if an employer intentionally injures an employee, the Act does not apply.”¹⁸ Thus, it has been generally accepted that the employer’s intentional torts may be actionable notwithstanding the exclusive nature of the Worker’s Compensation Act.

Baker does not change the result reached in *National Can* that intentional torts may be actionable, but it rejects the concept of an “exception” to the Act. The landmark decision in *Evans v. Yankeetown Dock Corp.*,¹⁹ where the supreme court held that “injury or death by accident” as used in the Worker’s Compensation Act means unexpected injury or death,²⁰ anticipated the demise of the intentional tort “exception” outlined in *National Can* and its progeny. Relying on *Evans*, the *Baker* court reasoned: “Because we believe an injury occurs ‘by accident’ only when it is intended by neither the employee nor the employer, the intentional torts of an employer are necessarily beyond the pale of the act.”²¹ Thus, the Act contemplates no “exceptions.” Instead, it is the exclusive remedy for “injuries or death by accident arising out of and in the course of the employment,” and injuries that occur outside of that rule, such as those intended by the employer, may be actionable outside of the Act.²²

The court next addressed the level of intent necessary to constitute “intent” to harm, and who must intend the harm in order for the employer to be liable to civil suit. On the first issue, the court upheld the *National Can* rule that “nothing short of deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice.”²³

The court also upheld *National Can* on the question of who must intend the injury. Imputing intent to the employer for actions committed by supervisors or foremen does not suffice, and would expose employers to tort liability for acts over which they have little control.²⁴ The court noted that injuries by co-workers have been treated as “by accident” in Indiana.²⁵ Accordingly, it must be the employer who harbors the intent and not merely a supervisor, manager, or foreman.²⁶

In sum, under *Baker*, plaintiffs may pursue civil damages against an employer. However, in order to withstand the employer’s invocation of the Worker’s Compensation Act as a defense, civil plaintiffs must show: 1) an intentional injury; 2) committed by the employer itself; and 3) “deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur.”²⁷

With respect to the ODA, the *Baker* court concluded that no intentional tort exception exists, and further held that the legislature intended the ODA as the exclusive remedy for

18. *Id.* at 1232. This reasoning was followed by the appellate courts in *Gordon v. Chrysler Motor Corp.*, 585 N.E.2d 1362 (Ind. Ct. App. 1992), and *Cox v. American Aggregates Corp.*, 580 N.E.2d 679 (Ind. Ct. App. 1991).

19. 491 N.E.2d 969 (Ind. 1986).

20. *Id.* at 975.

21. *Baker*, 637 N.E.2d at 1273.

22. *Id.*

23. *Id.* at 1275.

24. *Id.*

25. *Id.* at 1275 n.6.

26. *Id.* at 1275.

27. *Id.*

all occupational diseases arising out of and in the course of employment, whether accidental or intentional.²⁸ The ODA contains an exclusive remedy provision in section 22-3-7-6 of the Indiana Code. The provision states: “The rights and remedies granted under this chapter . . . on account of death or disablement by *occupational disease* arising out of and in the course of employment shall exclude all other rights and remedies of such employee . . .”²⁹ The ODA substitutes the phrase “occupational disease” in place of the “by accident” element found in the Worker’s Compensation Act;³⁰ this difference was critical to the court’s conclusion that intentional torts were “beyond the pale of the Act.”³¹

The court determined that because the ODA does not contain the “by accident” language, the legislature did not intend for civil remedies to be available for intentionally caused occupational diseases.³² In other words, under the ODA, the employee does not have to show that an injury was “by accident,” but merely that the occupational disease arose out of and in the course of employment.³³ Accordingly, to withstand an employer’s invocation of the ODA as a defense to a tort claim, a plaintiff would have to prove that the occupational disease did not arise out of the employment nor in the course of employment.

This construction means that the ODA should provide an administrative remedy for both accidental and intentionally caused occupational diseases arising out of and in the course of employment. However, even if the General Assembly intended that an employer would be permitted to intentionally inflict occupational diseases with immunity from civil liability, such a policy does not seem to promote caution on the part of employers.

Notwithstanding early pronouncements on the decision, *Baker* is no invitation to plaintiffs to pursue civil actions. The day after *Baker* was handed down, an article appeared in the *Indianapolis Star* with the headline *Court Makes It Easier for Injured Workers to Sue*.³⁴ Actually, the court merely reaffirmed the historic rule that makes it difficult for injured workers to circumvent the exclusive remedy provision. The *Baker* court essentially adopted the rule and reasoning in Larson’s treatise:

Intentional injury inflicted by the employer in person on his employee may be made the subject of a common-law action for damages on the theory that, in such an action, the employer will not be heard to say that his intentional tort was an “accidental” injury and so under the exclusive provisions of the compensation act. The same result may follow when the employer is a corporation and the assailant is, by virtue of control or ownership, in effect the alter ego of the corporation.³⁵

28. *Id.* at 1276-77.

29. IND. CODE § 22-3-7-6 (1993) (emphasis added).

30. *Baker*, 637 N.E.2d at 1276.

31. *Id.* at 1273.

32. *Id.* at 1276-77.

33. *Id.* at 1277.

34. Albert, *supra* note 14, at B5.

35. LARSON, *supra* note 1, at § 68.00.

Under *Yankeetown* and *Baker*, injuries or death will be compensable under the Worker's Compensation Act where each of the following elements can be shown: 1) personal injury by accident; 2) personal injury arising out of the employment; and 3) personal injury arising in the course of employment.³⁶ *Yankeetown* held that the phrase "by accident" means an "unexpected event" or an "unexpected result."³⁷ Under this definition of "by accident," a broad array of injuries is actionable under the Act and not in tort, as long as the claimant can prove that the accidental injury arose out of and in the course of employment. For plaintiffs wishing to pursue intentional tort actions for injuries arising out of and in the course of employment, only a truly intentional tort committed by the owner or the alter ego of a company will be actionable.

Yankeetown and *Baker* reinforce the stability of Indiana worker's compensation. *Yankeetown* provides broad coverage under the Act. While it will remain difficult for plaintiffs to seek civil damages for injuries arising out of and in the course of employment, *Baker* guarantees that the Act will not be swallowed by large numbers of tort actions.

2. *Foshee v. Shoney's Inc.*—The supreme court addressed an act of violence in the workplace in *Foshee v. Shoney's Inc.*³⁸ The question on review was whether worker's compensation would be the victim's exclusive remedy against her employer. Following *Baker*,³⁹ the court held that the trial court's decision barring the plaintiff's tort claim was correct.⁴⁰ Amy Foshee began working at Shoney's in 1989, and became the object of harassment from a co-worker, Eric Holmes. The complaints of Foshee and other employees about Holmes were reported to management, who did not remedy the problem. On November 15, 1989, Foshee was scheduled to work with Holmes, and the harassment continued. At the end of Holmes' shift, Teresa Blosl, a manager, informed Foshee that Holmes would no longer be working at the restaurant.

Foshee claimed that Holmes returned to Shoney's four times that evening. Upon the first visit, a manager warned Foshee "to stay behind the waitress' line, so that nothing [would] happen to [her]."⁴¹ Foshee's shift ended, but she remained on the premises, because Blosl and Charles Ervin, another manager, had asked her for a ride home. Holmes returned a second time, claiming that he intended to harm Foshee. Blosl instructed Foshee to hide in the women's restroom. Later, Holmes returned with Michael Vance to pick up Shoney's employee Raymond Vance, and left before 11:00 p.m.

Around 11:30 p.m. Blosl, Ervin, and Foshee were leaving the restaurant and were approached by Holmes and the Vance brothers, who had been lying in wait. Ervin and Blosl were killed first, and the store's night deposit bag was taken from Ervin. Holmes then knifed Foshee repeatedly and left her for dead. Foshee called for help from a pay phone before collapsing.

Foshee's civil complaint alleged that Shoney's "allowed" events to transpire which posed 'an imminent likelihood of injury or death to the Plaintiff and where this injury or

36. *Yankeetown*, 491 N.E.2d at 973.

37. *Id.* at 974-75.

38. 637 N.E.2d 1277 (Ind. 1994).

39. See *supra* text accompanying notes 13-36.

40. *Foshee*, 637 N.E.2d at 1279.

41. *Id.*

death was substantially certain to occur” and that Shoney’s placed “inexperienced and untrained” management on duty the evening of November 15, 1989.⁴² Shoney’s moved for judgment on the pleadings based on the exclusive remedy provision of the Worker’s Compensation Act, arguing that Foshee had failed to state a claim upon which relief could be granted. The trial court granted Shoney’s motion and entered final judgment in its favor.⁴³

The judgment was affirmed on appeal on the reasoning that Foshee’s injuries arose out of and in the course of her employment and were accidental.⁴⁴ Foshee conceded that her injuries arose in the course of her employment. The court of appeals also found that Foshee’s injuries did not qualify for the “intentional tort exception” found in *National Can.*⁴⁵ The supreme court granted transfer to harmonize the appellate decision in *Foshee* with the supreme court’s disposal of the “intentional tort exception” to the Act in *Baker*.⁴⁶

The supreme court first addressed the defendant’s use of a Trial Rule 12(C) motion for judgment on the pleadings. Because Shoney’s defense was based on the exclusive remedy provision of the Act, Shoney’s was asserting that jurisdiction belonged to the Worker’s Compensation Board. The court thus pointed out that raising the exclusive remedy provision as a defense to a tort action attacks the civil court’s subject matter jurisdiction, and the proper defensive motion is therefore a Trial Rule 12(B)(1) motion to dismiss for lack of subject matter jurisdiction.⁴⁷

The court went on to address the merits of Foshee’s tort action in light of its decision in *Baker*, which refuted the existence of an “intentional tort exception” to the Worker’s Compensation Act. Rather,

[u]nder *Baker*, two requirements must be met before an injury can be said to have been intended by the employer and thus not “by accident.” The tort must have been committed by the employer (or by the employer’s alter ego), and the employer must also have intended the injury or actually known that injury was certain to occur.⁴⁸

Foshee proved neither that the corporation was the tortfeasor’s alter ego, nor that the on-site managers owned or controlled Shoney’s. She did not suggest the existence of any “regularly made policy or decision of Shoney’s which prompted her injuries,”⁴⁹ and she failed to prove that her injuries were intended by Shoney’s. The court therefore held that worker’s compensation was her exclusive remedy.⁵⁰

Only Justice DeBruler dissented. Acknowledging *Yankeetown* and *Baker*, DeBruler argued that Foshee had stated a claim against Shoney’s if her complaint were read as

42. *Id.*

43. *Id.* at 1279-80.

44. *Id.* at 1280.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 1281.

49. *Id.*

50. *Id.*

required by Trial Rule 8(F).⁵¹ According to DeBruler, the facts of the case should have lead to a different result. He stated:

Foshee clocked out at 10:00 p.m. and changed into civilian clothes. She agreed to give two managers a ride home in her car. This served her personal interests and not those of Shoney's. She remained in the restaurant, waiting for the two managers. This was a public area. The restaurant was open until 11:00 p.m. During this hour, the danger to Foshee's physical well-being became manifest to all then present.⁵²

Justice DeBruler stated that Foshee's complaint did not state a worker's compensation claim, but it did state a civil claim against Shoney's.⁵³ DeBruler's dissent highlights that although *Yankeetown* and *Baker* appear to have settled long-debated questions of law, plaintiffs may continue to seek tort remedies by arguing the facts of each case. Though an employer may not have harbored sufficient intent to injure an employee, the plaintiff may still argue that injuries did not arise out of and in the course of employment.

3. *Perry v. Stitzer Buick GMC, Inc.*—The supreme court addressed an employee's civil rights and tort claims against an employer in *Perry v. Stitzer Buick GMC, Inc.*⁵⁴ The employer raised the exclusive remedy of the Worker's Compensation Act as a defense. The opinion detailed Stitzer's conduct as alleged by Perry, an African-American who became one of Stitzer's top sales agents after joining the dealership in August of 1987. By November of 1987, Perry had become the target of a racially-motivated attempt to force him out of the dealership. On November 11, a Stitzer general manager informed Perry and another African-American co-worker of his belief that all black people steal. Perry reported the incident to the manager's immediate supervisor to no avail. Later that day, the leasing manager used the word "nigger" in Perry's presence.⁵⁵

Another day, Perry needed a sales manager's approval on a sale. The manager, who routinely referred to Perry as "dummy" and "stupid," became violent because Perry had been unable to complete a sale to an elderly black couple and called him a "black son of a bitch" and other epithets. Perry was then shoved into the sales office where he was threatened with termination. Finally, Perry was told to "get [his] ass out there and try to sell another car."⁵⁶ He answered "yes sir," wiped the spit off his face, and left the showroom amid the joking of his co-workers.⁵⁷ Stitzer employees then "bet" he would not return. When Perry did return for the next day of business, the sales manager said, "Damn, he's still here."⁵⁸ The next day, Perry was fired.

51. *Id.* at 1282. Indiana Trial Rule 8(F) states: "All pleadings shall be so construed as to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points." IND. R. TR. P. 8(F).

52. *Foshee*, 637 N.E.2d at 1282.

53. *Id.*

54. 637 N.E.2d 1282 (Ind. 1994).

55. *Id.* at 1284.

56. *Id.* at 1285.

57. *Id.*

58. *Id.*

Perry brought suit against Stitzer Buick GMC, Inc., its president David Stitzer, secretary-treasurer Byron Stitzer, sales manager Tony Houk, general manager David Loury, and leasing manager Carl Weidner, all in their official capacities. Perry's complaint alleged assault, slander, and assault and battery.

At trial, Stitzer relied on *Yankeetown*⁵⁹ in requesting summary judgment, arguing that "there is no genuine issue of material fact that the [p]laintiff's [c]omplaint is barred by the exclusivity provision of the Indiana Worker's Compensation Act."⁶⁰ The trial court granted the request.⁶¹

As discussed in *Foshee v. Shoney's, Inc.*,⁶² summary judgment is based on a finding that no material issues of fact necessitate trial. Yet the invocation of the exclusivity provision of the Worker's Compensation Act "presents a threshold question concerning the court's power to act."⁶³ Accordingly, the proper affirmative defense would be a motion to dismiss for lack of subject matter jurisdiction.⁶⁴ As for the burden of proof on subject matter jurisdiction, the *Perry* court stated that "[t]here is a strong public policy favoring the coverage of employees under the act. Thus, when the plaintiff's own complaint recites facts demonstrating the employment relationship[,] . . . the burden shifts to the plaintiff to demonstrate some grounds for taking the claim outside of the Worker's Compensation Act."⁶⁵

Because Stitzer's motion should have been converted by the trial court to a motion to dismiss for lack of subject matter jurisdiction, the burden would have shifted to Perry to establish jurisdiction. On appeal, Perry alleged that the employer's intentional torts fell outside of the scope of the Worker's Compensation Act. However, court found that the mere allegation of an intentional tort was insufficient to establish jurisdiction.⁶⁶ Under the companion decision in *Baker v. Westinghouse*,⁶⁷ the employee must show that the injuries were not "by accident." Furthermore, under *Baker*, tortious intent will be imputed to the employer only where the employer is the tortfeasor's alter ego, and the corporation has substituted its will for that of the individual who committed the tortious acts.⁶⁸ The court concluded that Perry failed to establish trial court jurisdiction on the grounds that he had suffered intentional, non-accidental injuries at the hands of Stitzer.⁶⁹

However, Perry advanced another argument in favor of trial court jurisdiction by arguing that his injuries were not contemplated by the Worker's Compensation Act. The

59. See *supra* text accompanying note 12.

60. *Perry*, 637 N.E.2d at 1286.

61. *Id.*

62. See *supra* text accompanying notes 38-52.

63. *Perry*, 637 N.E.2d at 1286.

64. *Id.*

65. *Id.* (citing *Burgos v. City of New York*, 98 A.D.2d 788 (N.Y. App. Div. 1983); *Doney v. Tambouratgis*, 587 P.2d 1160 (Cal. 1979)); cf. 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 12-12 (1993).

66. *Perry*, 637 N.E.2d at 1287.

67. See *supra* text accompanying notes 13-36.

68. *Perry*, 637 N.E.2d at 1287 (citing *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1275-76 (Ind. 1994)).

69. *Id.* at 1288.

court agreed with Perry that his embarrassment, humiliation, and damage to reputation and character do not constitute "personal injury or death" for purposes of compensability under section 22-3-2-2.⁷⁰ Perry and Stitzer agreed that Perry had suffered no physical injury, loss of ability to work, or loss of function. Were it not for his termination, Perry would have been willing and able to continue to work at Stitzer.

What, then, does the phrase "personal injury or death" contemplate? Certainly the definition would have to include "disability" and "impairment." The Worker's Compensation Act contains schedules for the limited compensation of impairment and disability.⁷¹ "Impairment" refers to an employee's loss of physical function.⁷² "Disability" refers to an injured employee's inability to work.⁷³ In the instant case, however, Perry's injuries resulted in no impairment nor disability. Summary judgment was reversed and the case was remanded.⁷⁴ The court explained as follows:

In sum, the injuries at the heart of Perry's complaint were not physical, nor was there any impairment or disability as those terms are comprehended by the act. Accordingly, we hold that Perry's claims are not barred by the exclusive remedy clause of the Worker's Compensation Act because, alone, they present no injuries covered by the act.⁷⁵

The holding that worker's compensation is not the exclusive remedy for nonphysical injuries and the remand of the case reminds the practitioner that there are actually four elements necessary for establishing compensability of a work-related grievance under section 22-3-2-2 of the Indiana Code: 1) personal injury or death; 2) personal injury or death by accident; 3) personal injury or death arising out of the employment; and 4) personal injury or death arising in the course of employment.

Justice Dickson, concurring with the result and reasoning of the majority's decision, would have gone further. On remand, Perry's claim would be subject to the application of the fellow-servant rule,⁷⁶ which might shield Stitzer from tort liability. Dickson asserted that the time was appropriate to restrict the application of the doctrine, arguing that the rule was developed prior to the enactment of worker's compensation schemes and that employers are now "insulated from full responsibility for personal injuries to their employees by the worker's compensation law and its prohibition of common law personal injury actions."⁷⁷

70. *Id.*

71. See IND. CODE §§ 22-3-3-7 to -10 (1993).

72. *Perry*, 637 N.E.2d at 1288 (citing *Talas v. Correct Piping Co.*, 435 N.E.2d 22 (Ind. 1982); *Perez v. United States Steel Corp.*, 359 N.E.2d 925 (Ind. Ct. App. 1977)).

73. *Id.* (citing *Talas*, 435 N.E.2d at 26).

74. *Id.* at 1289.

75. *Id.*

76. Under the fellow servant rule an employer is not liable for acts against one employee by another employee, even though the employer would be liable for the act if it were committed against a non-employee. *Id.*

77. *Id.*

B. Tort Actions Against Owners and Contractors: Wolf v. Kajima

In *Wolf v. Kajima International Inc.*,⁷⁸ the supreme court granted transfer to consider the tort liability of owners or general contractors to injured employees of subcontractors, where the general contractor had arranged and paid for worker's compensation coverage on behalf of the subcontractor.⁷⁹ Wolf, an employee of C.J. Rogers, lost his left leg below the knee and suffered a crushed right femur when a section of steel fell from a crane at the Lafayette Subaru-Isuzu Automotive (SIA) plant.⁸⁰ C.J. Rogers was subcontracting for Kajima International, the general contractor at the SIA project. Wolf received worker's compensation benefits for his injuries from a "wrap-around" policy purchased for C.J. Rogers by SIA. The policy was designed to insure SIA and its contractors and subcontractors, including C.J. Rogers, with separate policy certificates.⁸¹

Wolf then brought a negligence action against SIA and its general contractor, Kajima International. The trial court granted summary judgment in favor of Kajima and SIA on the grounds that public policy demanded that SIA and Kajima be treated as "statutory employers" because they provided worker's compensation benefits to Wolf.⁸² Accordingly, SIA and Kajima would receive the benefit of the exclusive remedy provision of the Worker's Compensation Act.

On appeal, summary judgment was reversed.⁸³ The court noted that although an owner or general contractor has the duty to require a subcontractor to show certification by the Worker's Compensation Board of insurance coverage,⁸⁴ it has no statutory duty to purchase worker's compensation insurance on behalf of contractors.⁸⁵ Rather, the duty to insure falls to the immediate employer.⁸⁶ If an owner or general contractor failed to seek a certificate of coverage from a contractor that is found to have been without coverage, the owner or general contractor, pursuant to section 22-3-3-14(b) of the Indiana Code, becomes secondarily liable for the payment of worker's compensation.⁸⁷

SIA argued that because it had failed to exact a certificate of compliance from C.J. Rogers, it was now secondarily liable to Wolf for worker's compensation benefits and immune from tort liability. The court rejected this argument, as SIA had voluntarily purchased the insurance on behalf of C.J. Rogers.⁸⁸

The court held that "an owner or general contractor does not alter its status concerning potential tort liability to employees of contractors or subcontractors by directly purchasing worker's compensation insurance on behalf of subcontractors," and the exclusive remedy of worker's compensation does not apply to prohibit employees from

78. 629 N.E. 2d 1237 (Ind. 1994).

79. *Id.*

80. *Wolf v. Kajima Int'l*, 621 N.E.2d 1128 (Ind. Ct. App. 1993).

81. *Id.* at 1129.

82. *Id.* at 1129-32.

83. *Id.* at 1132.

84. IND. CODE § 22-3-2-14(b) (1993).

85. *Wolf*, 621 N.E.2d at 1132.

86. *Id.*

87. *Id.*

88. *Id.* at 1132.

asserting third-party claims against persons other than the employer.⁸⁹ The Indiana Supreme Court granted transfer and adopted, by reference, the holding in the decision of the court of appeals.⁹⁰

C. Exclusive Remedy Provision: Appellate Decisions

1. *McQuade v. Draw Tite, Inc.*—The plaintiff in *McQuade v. Draw Tite, Inc.*⁹¹ was injured in a work-related accident at Mongo Electronics, a subsidiary of Draw Tite, on April 27, 1993. A claim was filed under the Worker's Compensation Act the following day. The plaintiff also filed a negligence suit in the LaGrange Circuit Court against Draw Tite. Draw Tite successfully moved for summary judgment based on the exclusivity provision of the Act, and the plaintiff appealed.⁹² *McQuade* addressed two issues. For the first time, the Indiana court discussed the question of whether a parent corporation could be liable for negligence when a compensable worker's compensation injury occurred at a subsidiary operation. Second, the court addressed the propriety of using a motion for summary judgment when attempting to invoke the exclusivity defense to a civil lawsuit.

McQuade argued that Draw Tite, as the parent corporation of Mongo, was amenable to civil suit as a third party under section 22-3-2-13 of the Indiana Code,⁹³ while Draw Tite claimed immunity under section 22-3-2-6,⁹⁴ the exclusive remedy provision. The question of whether a parent corporation could be considered liable as a third party for a work-related accident where a claim for worker's compensation had been filed against the subsidiary had not previously been addressed. However, the Seventh Circuit had addressed the same issue of Indiana law in *Reboy v. Cozzi Iron & Metal, Inc.*⁹⁵

In *Reboy*, the parent Cozzi corporation asked the court to "pierce the corporate veil" and find that a subsidiary "was so highly integrated with the Cozzi corporation that they should be treated as one corporate entity for the purpose of applying the exclusivity provision."⁹⁶ This "corporate veil" test would require that separate corporate identities "be disregarded where one corporation is so organized and controlled and its affairs are so conducted by another corporation that it is a mere instrumentality or adjunct of the other corporation."⁹⁷

In addition to *Reboy*, the court relied on a Michigan appellate decision for further guidance. In *Verhaar v. Consumers Power Co.*,⁹⁸ the court cited several factors to be applied in "reverse piercing" in the corporate veil test, including: 1) the use of a combined worker's compensation policy; 2) combined bookkeeping and accounting system; 3) a single personnel policy; 4) control of the employee's duties; 5) payment of

89. *Wolf*, 629 N.E.2d at 1237 (citing *Wolf*, 621 N.E.2d at 1132).

90. *Id.*

91. 638 N.E.2d 818, 819 (Ind. Ct. App. 1994).

92. *Id.* at 818.

93. IND. CODE § 22-3-2-13 (1993).

94. *Id.* § 22-3-2-6.

95. 9 F.3d 1303, 1308 (7th Cir. 1993).

96. *Id.*

97. *Id.*

98. 446 N.W.2d 299 (Mich. Ct. App. 1989).

wages; and 6) performance of the employee's duties as an integral part of the employer's business toward the accomplishment of a common goal.⁹⁹ The *McQuade* court adopted this test.¹⁰⁰

The court cited author Arthur Larson for the proposition that the most significant factor in determining liability of the parent corporation is actual control.¹⁰¹ The higher the degree of control exercised by the parent, the more likely it is that parent and subsidiary will be found to constitute a single entity for purposes of worker's compensation and the exclusivity provision. The court then adopted a synthesis of the Seventh Circuit and Michigan decisions as the standard against which the relationship of parent and subsidiary companies would be evaluated. Because the trial court found, and both parties agreed, that Draw Tite had the right and the ability to control all aspects of the operations of Mongo Electronics, there was sufficient factual evidence to confer immunity on Draw Tite.¹⁰² Draw Tite and Mongo had a combined worker's compensation insurance policy, had prepared combined Federal Income Tax filings, had similar personnel policies, and all accounting and payroll was performed by Draw Tite for Mongo.¹⁰³

The court of appeals accordingly concluded that the plaintiff's action against the parent corporation was barred by the exclusivity provision. However, following the recent supreme court decision in *Perry v. Stitzer Buick GMC, Inc.*,¹⁰⁴ the court reversed and remanded the case with instructions to enter a dismissal for lack of subject matter jurisdiction pursuant to Indiana Trial Rule 12(B)(1).¹⁰⁵ In *Perry*, the supreme court held that the use of summary judgment was improper, reasoning that the defense of exclusivity attacks the civil court's subject matter jurisdiction.¹⁰⁶

2. *Seaton-SSK Engineering, Inc. v. Forbes*.—In *Seaton-SSK Engineering, Inc. v. Forbes*,¹⁰⁷ the court addressed the applicability of the exclusive remedy provision of the Act to civil actions against third parties. Clearly, the Worker's Compensation Act does not bar civil suits against third party tortfeasors.¹⁰⁸ Although a worker injured by accident arising out of and in the course of employment will not win a civil remedy against his employer, the worker might collect in third party suits. For example, a delivery driver injured in an automobile accident might collect worker's compensation and also collect from the driver of the other automobile. Section 22-3-2-13 of the Worker's Compensation Act entitles the insurance carrier to a lien on proceeds from such third-party actions.¹⁰⁹

In the instant case, however, a question arose as to whether the parties sued by Forbes were actually third parties. In November 1988, Forbes, an employee of CMI-Permanent

99. *Id.* at 300-01.

100. *McQuade v. Draw-Tite, Inc.*, 638 N.E.2d 818, 820 (Ind. Ct. App. 1994).

101. *Id.* at 820-21.

102. *Id.* at 821-22.

103. *Id.* at 822.

104. 637 N.E.2d 1282 (Ind. 1994); *see supra* text accompanying notes 54-77.

105. *McQuade*, 638 N.E.2d at 822.

106. *Perry v. Stitzer Buick GMC, Inc.*, 637 N.E.2d 1282, 1286 (Ind. 1994). For a discussion of that case, *see supra* subpart I.A.3.

107. 639 N.E.2d 1048 (Ind. Ct. App. 1994).

108. *Id.* at 1049 (citing *Stump v. Commercial Union*, 601 N.E.2d 327, 330 (Ind. 1992)).

109. *See IND. CODE § 22-3-2-13 (1993).*

Mold, lost his right arm while operating a molding machine manufactured by Seaton-SSK.¹¹⁰ Permanent Mold paid statutory worker's compensation to Forbes.¹¹¹ In November 1990, Forbes sued a number of third parties, including CMI (the parent company of CMI-Permanent Mold), and Seaton-SSK (a subsidiary of CMI and the manufacturer of the molding machine).¹¹²

Although CMI, Seaton, and Permanent Mold were all organized as separate corporations, CMI and Seaton relied on a 1963 Utah decision, *Cook v. Peter Kiewit Sons Co.*¹¹³ for the proposition that they comprised one "employing unit," and accordingly moved for summary judgment, arguing that Forbes' civil suit was barred by section 22-3-2-6, the exclusivity provision of the Act.¹¹⁴ The sole issue on review was whether the exclusive remedy provision of the Worker's Compensation Act applied to CMI and Seaton because Forbes received Worker's Compensation from Permanent Mold.

The court noted that treatment as an employing unit might be appropriate because CMI and its subsidiaries pursued a "common profit objective" and "all subsidiaries directly or indirectly bear the cost of providing worker's compensation benefits."¹¹⁵ CMI and Seaton also argued that it would be inequitable to order "double payments" by one employing unit. They relied on a 1992 Michigan decision, *Isom v. Limitorque Corp.*,¹¹⁶ for the contention that the Worker's Compensation Act should be construed liberally when asserted as a defense because it must be liberally construed to allow benefit collection.¹¹⁷

CMI and Seaton argued, assuming that they comprised one employment, that Forbes was actually attempting to invoke the "dual capacity" doctrine available in some jurisdictions, which the court here characterized as "*an exception to the exclusive remedy* of the worker's compensation scheme."¹¹⁸ The rationale of the dual capacity doctrine is that the employer may breach a duty not arising out of the employer-employee relationship, or that the employer may cause an injury in a role other than that of employer, for example, by manufacturing a defective product.¹¹⁹ If the molding machine manufactured by Seaton was unsafe, there might be a breach of duty not directly related to the employment relationship of Forbes and Permanent Mold.¹²⁰

110. *Forbes*, 639 N.E.2d at 1048.

111. *Id.*

112. *Id.*

113. 386 P.2d 616, 618 (Utah 1963).

114. *Forbes*, 639 N.E.2d at 1048-49.

115. *Id.* at 1049.

116. 484 N.W.2d 716, 716 (Mich. Ct. App. 1992).

117. *Forbes*, 639 N.E.2d at 1049.

118. *Id.* (emphasis added). Note that the court characterized the dual capacity doctrine as an exception to § 22-3-2-6, although the July supreme court decision in *Baker v. Westinghouse* rejected the theory of an intentional tort exception to the Act. *See supra* text accompanying notes 13-36.

119. *Forbes*, 639 N.E.2d at 1050 (citing *White v. E.I. DuPont de Nemours and Co.*, 523 F. Supp. 302, 303 (W.D. Va. 1981) and *Kelly v. Johns-Manville Corp.*, 590 F. Supp. 1089, 1102 (E.D. Pa. 1984)).

120. *Id.*

However, the court rejected the dual capacity doctrine, following *Needham v. Fred's Frozen Foods, Inc.*¹²¹ In that case, the court of appeals had rejected the dual capacity doctrine where a worker was injured while cleaning a pressure cooker manufactured by his employer, stating that civil liability would be inconsistent with the Act's statutory abrogation of "all other rights and remedies" against the employer.¹²²

Having disposed of the possibility of affirming the trial court's summary judgment based on the dual capacity doctrine, which would have depended on a finding that CMI, Seaton, and Permanent Mold comprised one "employment unit," the court proceeded to decide whether those companies were separate corporate entities. Forbes, citing Michigan authorities, argued for the adoption of an "economic reality" test involving consideration of the "totality of the circumstances surrounding the work performed," such as: control of worker duties; payment of wages and benefits; the right to hire, fire, and discipline; and the performance of duties as an integral part of the employer's business.¹²³ Based on the record regarding the relationship of CMI, Seaton, and Permanent Mold, the court found that a question of fact existed as to whether "'the totality of circumstances surrounding the work performed' is such that CMI or Seaton" exercised control over Permanent Mold employees.¹²⁴

The court decided that a factual determination as to the integration between CMI and its subsidiaries was a necessary prerequisite to the application of section 22-3-2-6 of the Indiana Code.¹²⁵ If the defendants were not found to be a single employing unit, they would be vulnerable to civil suit. The court ruled that summary judgment was properly denied.¹²⁶

3. *Peavler v. Mitchell & Scott Machine Co.*—In *Peavler v. Mitchell & Scott Machine Co.*,¹²⁷ the court addressed another act of violence against an employee. In May of 1991, Peavler was working for Mitchell & Scott Machine Company when she was shot and killed by her ex-boyfriend. The gunman had previously entered the premises to threaten Peavler and had been escorted out of the plant. At the time of the shooting, no guards were on duty and the gunman did not report to anyone before entering.

Peavler's personal representatives brought an action against her employer alleging negligence in failing to provide a reasonably safe workplace as the proximate cause of her death.¹²⁸ Peavler's representatives argued that the employer was aware of the danger to Peavler and should have taken reasonable precautions for her protection.¹²⁹ The employer

121. 359 N.E.2d 544 (Ind. App. 1977).

122. *Id.* at 545. Another approach to dual capacity cases would be to dispose of the harsh rule barring all civil suits, in favor of following the plain language of the Act's compensability clause at IND. CODE § 22-3-2-2 (1993). The court could then rule on the question of whether an injury caused by the same employer's breach of the duty to manufacture a safe product "arises out of and in the course of employment." If injury due to the breach does not arise out of and in the course of employment, it could not be barred by § 22-3-2-6.

123. *Forbes*, 639 N.E.2d at 1050.

124. *Id.* at 1051-52.

125. *Id.* at 1051.

126. *Id.*

127. 638 N.E.2d 879 (Ind. Ct. App. 1994).

128. *Id.* at 880.

129. *Id.*

moved for judgment on the pleadings, arguing that the claim was barred by the exclusive remedy provision of the Worker's Compensation Act, which was granted by Marion Superior Court II.¹³⁰

On appeal, the court noted that the defendant's motion for judgment on the pleadings was improper.¹³¹ The opinion cited *Perry v. Stitzer Buick GMC, Inc.*¹³² for the proposition that the appropriate motion for attacking the court's subject matter jurisdiction is made pursuant to Indiana Trial Rule 12(B)(1).¹³³

In *Peavler*, the court addressed three types of risk that can cause injury or death: 1) risks distinctly associated with the employment; 2) risks personal to the claimant; and 3) "neutral" risks that have no particular employment or personal character.¹³⁴ Generally, risks that fall in the first and third categories are covered by the Indiana Worker's Compensation Act.¹³⁵ Harms of the second type, from risks personal to the employee, are "universally noncompensable" under the Worker's Compensation Act.¹³⁶ For example, the employee with a mortal enemy who seeks him out at work falls into the second category, and "the assault cannot be said to arise out of the employment under any circumstances."¹³⁷

Indiana law provides that a personal squabble with a third person that culminates in an assault is not compensable under the act.¹³⁸ If, however, the assault might be reasonably anticipated because of the general character of the work (a "neutral" risk), the injury may be found to arise out of the employment.¹³⁹

The decedent here was murdered by her ex-boyfriend; the animosity that culminated in murder arose not out of the employment but out of the plaintiff's personal life. The decedent's representatives alleged that the boyfriend had been escorted out of the workplace on a prior occasion and that the employer was negligent in allowing him to enter the premises and in failing to protect her. However, the court found that there was no contention nor evidence that would reasonably support this allegation.¹⁴⁰

130. *Id.*

131. *Id.*

132. 637 N.E.2d 1282 (Ind. 1994); *see supra* text accompanying notes 54-77.

133. *Peavler*, 638 N.E.2d at 880. At first glance, the facts in *Peavler* appear similar to those in the recent supreme court decision in *Evans v. Yankeetown Dock Corp.*, in which an employee was murdered by a gunman. In *Yankeetown*, the court stopped a wrongful death action brought by the decedent's representatives by holding that the accidental death arose out of and in the course of employment and was therefore actionable only under the Worker's Compensation Act. 491 N.E.2d 969, 976 (Ind. 1986). However, the gunman in *Yankeetown* was a fellow employee. *Id.*

134. *Peavler*, 638 N.E.2d at 881 (citing *K-Mart Corporation v. Novak*, 521 N.E.2d 1346, 1349 n.1 (Ind. Ct. App. 1988); 1 LARSON, WORKMEN'S COMPENSATION LAW §§ 7.00-7.30 (1985)).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* (citing *Wayne Adams Buick, Inc. v. Ference*, 421 N.E.2d 733 (Ind. Ct. App. 1981)).

139. *Id.*

140. *Id.*

The court of appeals thus held that Peavler's death resulted from a risk personal to her, and did not arise out of and in the course of employment.¹⁴¹ The death would not be compensable under the Worker's Compensation Act, so the civil court had subject matter jurisdiction over the plaintiff's civil negligence action.

II. STATE EQUAL PROTECTION CHALLENGE TO THE EXCLUSION OF FARM WORKERS FROM MANDATORY COVERAGE UNDER THE WORKER'S COMPENSATION ACT

A. Indiana's Exclusion of Agricultural Employees from Mandatory Coverage

The article entitled *Farm Workers Can't Get Worker's Comp, Court Says*,¹⁴² appearing in the *Indianapolis Star* on November 30, 1994, produced some confusion and a flurry of phone calls about the Indiana Supreme Court's ruling in *Collins v. Day*.¹⁴³ Although *Collins* produced no change in the law, the headline was misleading; although the law does not require that farm workers be covered, agricultural employers may elect coverage under the Worker's Compensation Act.

Employers and employees should be aware of Indiana's rule regarding who must carry coverage, as opposed to those who have the option to elect coverage. Accordingly, the law regarding coverage of farm workers will be examined here. The supreme court's opinion in *Collins* will then be discussed.

Section 22-3-2-9(a) of the Indiana Code exempts "farm or agricultural employees" and "the employers of such persons" from mandatory coverage under the Worker's Compensation Act.¹⁴⁴ However, under section 22-3-2-9(b) of the Indiana Code,¹⁴⁵ the employer has the option of waiving the exemption and purchasing worker's compensation insurance for farm or agricultural employees.

An agricultural employer might want to purchase worker's compensation coverage for a number of reasons under section 22-3-2-9(b) of the Indiana Code. First, it is humane to guarantee that a worker who is injured on the job will receive medical treatment. If medical bills are not covered by insurance, the costs of work-related accidents are passed on to the worker's family or to the taxpayers. Second, as discussed in numerous cases above, the exclusive remedy provision of worker's compensation protects the employer from jury verdicts in the event an injured worker brings a civil suit. *Baker v. Westinghouse Electric Corps.*¹⁴⁶ and its companion decisions¹⁴⁷ outline the extent of this protection.

The following rules have arisen under Indiana Code section 22-3-2-9. Farm and agricultural employees are those who do traditional types of farm work, such as driving

141. *Id.* at 882.

142. Barb Albert, *Farm Workers Can't Get Worker's Comp, Court Says*, INDIANAPOLIS STAR, Nov. 30, 1994, at A17.

143. 644 N.E.2d 72 (Ind. 1994). This opinion was handed down on November 28, 1994, two days before the newspaper article was published.

144. IND. CODE § 22-3-2-9(a) (Supp. 1994).

145. *Id.* § 22-3-2-9(b).

146. 637 N.E.2d 1271 (Ind. 1994).

147. See *supra* text accompanying notes 13-77.

tractors, and tending crops. Whether a laborer is a farm employee within the Worker's Compensation Act is determined from the character of the work performed, not from the general occupation or business of the employer.¹⁴⁸ The determinative factor in deciding whether a laborer is within the Act is the character and nature of services rendered by the employee.¹⁴⁹ This assessment must be made considering the entire scope of the employee's job, not just the work being performed at the time of injury.¹⁵⁰

The term "agriculture" is "the art or science of cultivating the soil, including the planting of seed, the harvesting of crops, and the raising, feeding, and management of live stock or poultry."¹⁵¹ While farmers or agricultural employers are not required to carry worker's compensation coverage on employees whose jobs are entirely "agricultural," workers doing other types of work for agricultural employers may not be exempt from the Act.¹⁵²

Therefore, a farmer or agricultural employer who hires laborers to perform non-agricultural work is *not* exempt from the Act. Conversely, an employer whose primary business is non-agricultural, but who hires laborers whose jobs are strictly "agricultural," is exempt from mandatory coverage under the Act. There is no perfect rule for determining who is covered by the Act. The facts and circumstances of each situation should be considered. The following authorities, however, illustrate the general rule.

The several authorities that follow found employers/employees exempt from the Act. A person employed to pick cucumbers on a farm, who was killed while driving a truck between housing furnished by a canning operation and a farm, was considered a "farm or agricultural employee" not within the Act.¹⁵³ The employee of a state girls' school whose duties were limited to working on a farm operated by the school was a farm employee not covered by the Act.¹⁵⁴ A minor employed as a farm hand to operate a tractor was not covered.¹⁵⁵ Farm laborers employed by Purdue University, whose duties are limited to farm work, have been found not to be covered by the Act.¹⁵⁶ "Occasional excursions into or out of agricultural duties are disregarded when the employee by virtue of his regular employment has status as either a covered or exempt employee."¹⁵⁷

The authorities that follow found employers/employees bound by the Act. The employee of a farm implement business who travelled from farm to farm harvesting crops was not an agricultural employee exempted from the act.¹⁵⁸ A laborer employed by farmer as a carpenter to remodel a hog house was not an agricultural employee exempted

148. *Smart v. Hardesty*, 149 N.E.2d 547, 549 (Ind. 1958); *see also Heffner v. White*, 45 N.E.2d 342, 345 (Ind. Ct. App. 1942).

149. *Strickler v. Sloan*, 141 N.E.2d 863, 866 (Ind. App. 1957).

150. *H.J. Heinz v. Chavez*, 140 N.E.2d 500, 503 (Ind. 1957).

151. *Fleckles v. Hille*, 149 N.E. 915, 915 (Ind. App. 1925).

152. *Makeever v. Marlin*, 174 N.E. 517, 518 (Ind. App. 1931).

153. *Chavez*, 140 N.E.2d at 502-04.

154. *Dowery v. State*, 149 N.E. 922, 923 (Ind. App. 1925).

155. 1950 Op. Att'y Gen. 125, 130.

156. 1931-1932 Op. Att'y Gen. 829, 832-33.

157. 1C ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 53.00 (1990).

158. *Strickler v. Sloan*, 141 N.E.2d 863, 866-69 (Ind. App. 1957).

from the act.¹⁵⁹ An employee hired to operate corn shredder owned by farmer was not an agricultural employee.¹⁶⁰ Farmers who hired employees to blast coal and load coal wagons for sale to a third person were miners, not agricultural employees.¹⁶¹

In summary, the following five guidelines can be applied in determining whether worker's compensation applies to a specific employee. 1) Employers who hire laborers to do strictly agricultural work, such as driving tractors, tending crops, or managing livestock, may not be required to purchase worker's compensation insurance, but insurance may be purchased under section 22-3-2-9(b) of the Indiana Code even where it is not mandated. 2) The supreme court's decision does not affect employers who want to purchase, or who have purchased, worker's compensation insurance. If a farm/agricultural employee is injured or killed by accident arising out of and in the course of employment, and the employer has elected coverage under section 22-3-2-9(b) of the Indiana Code, that employee may be covered. 3) Employees whose employers have not opted for coverage may or may not be covered by the Worker's Compensation Act. If the employee is not covered by the Act, he or she may have other rights against the employer under the common law. 4) Farmers or other presumably agricultural employers who hire laborers to perform non-agricultural work should provide worker's compensation coverage for those employees. 5) Primarily non-agricultural employers who operate farms may be exempt from covering employees whose labor is strictly limited to agricultural activities as defined in case law.

B. *Collins v. Day*

*Collins v. Day*¹⁶² presented state and federal equal protection challenges to Indiana's exclusion of farm and agricultural employees from mandatory worker's compensation coverage at section 22-3-2-9(a) of the Indiana Code.¹⁶³ Article I, Section 23 of the Indiana Constitution provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."¹⁶⁴ The plaintiff/appellant argued that the exemption of agricultural laborers from the worker's compensation act violates Section 23 because it extends to a special class of employers an immunity denied to the general class of employers.

Eugene Collins was employed on the farm of defendant Glen Day, and on February 8, 1989, suffered a broken leg in an accident. Collins incurred \$12,000 in medical expenses and claimed lost wages of \$140 per week, in addition to the loss of use of a residence. The defendant had not elected to provide worker's compensation coverage under section 22-3-2-9(b), and thus denied liability to pay compensation and medical benefits to Collins. Collins's claim was denied at a worker's compensation hearing and by the full Board. On appeal, Collins asserted his constitutional arguments.

159. Heffner v. White, 45 N.E.2d 342, 345-46 (Ind. App. 1942).

160. Hahn v. Grimm, 198 N.E. 93 (Ind. App. 1935).

161. Hanna v. Warren, 133 N.E. 9 (Ind. App. 1921).

162. 644 N.E.2d 72 (Ind. 1994).

163. IND. CODE § 22-3-2-9(a) (1993).

164. IND. CONST. art. I, § 23.

The supreme court's analysis may be summarized as follows. The court held that Article 1, Section 23 of the Indiana Constitution requires that statutes granting unequal privileges and immunities may be upheld based on three rules:

First, the disparate treatment . . . must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Finally, in determining whether a statute complies with or violates Section 23, courts must exercise substantial deference to legislative discretion.¹⁶⁵

The court, in applying the above standards of review to the statutory exemption, found that "inherent distinctions" between agricultural and non-agricultural employees are "reasonably related" to the exemption.¹⁶⁶ These included 1) the prevalence of sole proprietorships and small employment units, 2) the nature of farm work and its inherent risks, 3) the level of worker training and experience, 4) the traditional informality of the agricultural employment relationship, and 5) the peculiar difficulties faced by agricultural employers in passing the cost of coverage on to the ultimate consumer.¹⁶⁷ The court also refused to find that Section 23 is violated by the voluntary election of coverage made available by section 22-3-2-9(b).¹⁶⁸

Assuming that the statutory exemption of farmworkers does not now violate Section 23, do the characteristics of farm employment continue to support the exemption from a policy standpoint? Under *Collins*, this question will only be answered by the legislature. However, if agricultural production continues to evolve from a family-oriented activity to a capital-intensive industry increasingly dominated by "agribusiness," will the "reasonable relation" of section 22-3-2-9(a) to the class of farm employers be eroded? Will the exemption become unconstitutional?

The supreme court hinted at such a possibility in its opinion. In its amicus brief, the Migrant Farmworker Project of the Legal Services Organization of Indiana ("the Project") argued that the constitutionality of the agricultural exemption had been eroded since the enactment of worker's compensation in 1915. The amicus brief was cited by the court for the Project's position that "the nature of agricultural work and the structure of agriculture . . . today is so radically different than in 1915, that the continued exclusion of farmworkers from worker's compensation coverage does not comply with legislat[ive] intent."¹⁶⁹

The court recognized that preferential treatment of a class of persons may later cease to be constitutional due to intervening socio-economic changes.¹⁷⁰ However, the court was unconvinced in this case that the plaintiff had carried "the burden on the challenger [of constitutionality] to negative every reasonable basis for the classification."¹⁷¹

165. *Collins*, 644 N.E.2d at 80.

166. *Id.* at 81.

167. *Id.*

168. *Id.* at 82.

169. *Id.* at 81 (citing Brief of Amicus Curiae at 3A).

170. *Id.*

171. *Id.*

Representing the interest of approximately 8600 migrant farmworkers, the Amicus Curiae detailed trends in Indiana agriculture in support of its contention that the constitutionality of the exemption had been eroded. Ninety-eight percent of migrant farm workers are Hispanic.¹⁷² Ninety-five percent are uninsured for medical problems.¹⁷³ Seventy percent live in migrant labor camps, which are generally owned by a farmer or processing plant.¹⁷⁴

Agribusiness has increased in importance in Indiana, while the traditional family farm mode of production has declined. There is a corresponding increase in the number of employees, rather than family members, performing agricultural work. This trend is marked by a decrease in the number of farms and an increase in the acreage of farms. In 1920, there were 205,126 farms in Indiana, and by 1978 there were only 70,506 farms.¹⁷⁵ Nationwide, it is projected that the largest one percent of farms will account for fifty percent of all farm production.¹⁷⁶

The Amicus Curiae also pointed out that because employers of farm workers may elect coverage under section 22-3-2-9(b), worker's compensation insurance for agricultural classifications is readily available. The insurance premium rate for the classification that would cover most of Indiana's migrant farm workers is \$2.68 per \$100 of payroll.¹⁷⁷

Finally, the Project's brief highlighted the risks associated with agricultural labor. Obviously, mechanization in agriculture and its attendant risks have increased dramatically since the enactment of the Worker's Compensation Act. For example, driving a tractor qualifies as a traditional type of farm work, and tractor drivers may therefore be exempt from the Act.¹⁷⁸ However, in 1920, there was just one tractor for every twenty-six farms; by 1969, there were 1.7 tractors for every farm.¹⁷⁹

Several other health risks were documented, including heat stress,¹⁸⁰ and disabling skin disorders due to exposure to pesticides and the sun.¹⁸¹ Pesticide exposure may also result in blurred vision, diarrhea, headaches, nausea, respiratory failure, paralysis, coma, and death.¹⁸² Fractures, strains, back problems, and repetitive motion injuries also occur with frequency among farm labor.¹⁸³ At present, the medical costs of these injuries must be borne by the taxpayer or by workers and their families, unless the employer has elected coverage or has a medical-only insurance policy.

172. Appendix to Brief of Amicus Curiae at Ap. 1, *Collins*, 644 N.E.2d 72 (No. 93502-9411-EX-1120).

173. *Id.*

174. *Id.*

175. *Id.* at Ap. 4.

176. *Id.* at Ap. 5.

177. Indiana Compensation Rating Bureau. The classification covering many migrant farm workers is Indiana Rating Code 0008, Gardening/Market Crops/Drivers.

178. *Smart v. Hardesty*, 149 N.E.2d 547, 549 (Ind. 1958).

179. Appendix to Brief of Amicus Curiae at Ap. 6, *Collins*, 644 N.E.2d 72.

180. *Id.* at Ap. 10.

181. *Id.*

182. *Id.*

183. *Id.* at Ap. 11.

Professor Larson, in his treatise on worker's compensation law, argues that the traditional justifications of farm-labor exemptions are difficult to support.¹⁸⁴ Clearly, strong policy considerations support protecting small and family farmers from the burdens of "handling the necessary records, insurance, and accounting."¹⁸⁵

If this is the reason, it ought to follow that the exemption should be confined to small farmers and not at the same time relieve from compensation responsibility the . . . farms which have much more in common with industry than with old-fashioned dirt farming.¹⁸⁶

Larson takes issue with the argument that agricultural employers cannot pass the cost of compensation insurance on to the consumer.

Less convincing is the argument that the farmer cannot, like the manufacturer, add his compensation cost to the price of his product and pass it on to the consumer. This might be true if an isolated state attempted compulsory coverage, but if all states extended coverage to farm labor, there would be no competitive disadvantage so far as the domestic market is concerned. As to the disparity between the domestic and world market, that problem already exists, and will not become essentially different because of a slight change in one domestic agricultural cost factor.¹⁸⁷

Finally, Larson refutes the argument that farm workers do not need the protection of worker's compensation:

Least convincing of all is the assertion that farm laborers do not need this kind of protection. Whatever the compensation acts may say, agriculture is one of the most hazardous of all occupations. In 1964, of 4,761,000 agricultural workers, 3,000 were fatally injured, while of 17,259,000 manufacturing employees, the number of fatalities was 2,000.¹⁸⁸

Indiana is one of eleven states that retains a statutory exemption for farm and agricultural labor.¹⁸⁹ As of 1990, thirty-nine worker's compensation jurisdictions covered agricultural workers, with fourteen jurisdictions extending the same coverage as is available to all workers and twenty-five imposing some limitations not applicable to the general class of employees.¹⁹⁰ Limiting conditions vary from state to state. Some jurisdictions exclude family members, others exclude employees earning less than a certain amount.¹⁹¹ Other jurisdictions protect small farmers who employ less than a certain number of workers.¹⁹²

184. LARSON, *supra* note 157, at § 53.20.

185. LARSON, *supra* note 157, at § 53.20.

186. LARSON, *supra* note 157, at § 53.20.

187. LARSON, *supra* note 157, at § 53.20.

188. LARSON, *supra* note 157, at § 53.20.

189. LARSON, *supra* note 157, at § 53.10.

190. 4 LARSON, *supra* note 157, at App. A-4-1.

191. LARSON, *supra* note 157, at § 53.10.

192. LARSON, *supra* note 157, at § 53.20.

Similar compromise options might be available to Indiana. For example, a mandatory medical-only provision covering farm workers could be added to the Act. This would guarantee that at least the medical costs of injuries are not passed on to workers, their families, or the taxpayers. Of course, many small farms remain in Indiana, upon which the imposition of mandatory worker's compensation coverage might be overly burdensome. Therefore, a distinction could be drawn allowing small and family farm operations to remain exempt from mandatory coverage, while requiring mandatory coverage of larger, corporate agricultural operations. One basis for this distinction could be the number of employees. Any combination of these options would likely pass constitutional muster under *Collins* by protecting the traditional family farmer from full obligations under the Act.

In conclusion, although the statutory exemption of farm labor from mandatory coverage under the Worker's Compensation Act was not found unconstitutional, the "reasonable relation" of the exemption to distinctions between agricultural and non-agricultural employers may not long survive, if the economic trends discussed above continue. It might be time to reweigh the policy considerations of the farm worker exemption.

III. CIVIL ACTION AGAINST EMPLOYER'S WORKER'S COMPENSATION CARRIER

In 1992, the Indiana Supreme Court held that a worker could maintain a civil cause of action against an employer's worker's compensation insurance carrier for mishandling a worker's compensation claim, independently of any claim for injuries under the Worker's Compensation Act.¹⁹³ In September of 1989, the plaintiff in the instant case, *ITT Hartford Insurance Group v. Trowbridge*,¹⁹⁴ slipped in grease and injured his left ankle while working at a Ponderosa Steakhouse.¹⁹⁵ In December of 1989, the Worker's Compensation Board approved an agreement between the parties for the payment of temporary total disability (TTD) compensation to Trowbridge.¹⁹⁶ ITT then terminated the claimant's compensation on the theory that Trowbridge had pre-existing problems with his ankle.¹⁹⁷ Trowbridge then filed an Application for Adjustment of Claim, the Board's administrative complaint, disputing the termination of TTD payments.¹⁹⁸

In April 1991 Trowbridge brought suit against his employer's insurance carrier, ITT Hartford Insurance Group, alleging that the carrier "intentionally, willfully, fraudulently, and without just cause" terminated worker's compensation payments.¹⁹⁹ Theories of intentional infliction of emotional distress, constructive fraud, actionable fraud, and intentional deprivation of statutory rights were added in an amended complaint.²⁰⁰ The defendant moved for dismissal based on the prematurity of the plaintiff's suit, arguing that

193. See *Stump v. Commercial Union*, 601 N.E.2d 327 (Ind. 1992).

194. 626 N.E.2d 567 (Ind. Ct. App. 1993).

195. *Id.* at 568.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

Trowbridge had failed to exhaust administrative remedies, and that the pending decision of the Worker's Compensation Board as to the compensability of his injuries would be outcome-determinative.²⁰¹ The trial court denied dismissal.²⁰²

The court of appeals held that the employee had to demonstrate resolution of his worker's compensation claim before he could maintain a third-party action against insurer for misconduct in handling his claim.²⁰³ The court said that Trowbridge would have to show, by successfully litigating his administrative claim, that ITT wrongfully denied compensation to which he was entitled.²⁰⁴ Thus, his civil action theories were inherently dependent upon whether he was entitled to continued compensation.²⁰⁵ The court also stated that the prematurity defense does not challenge the merits of an action and that Trowbridge would be free to reinstate the action upon maturity.²⁰⁶ Accordingly, the case was remanded with instructions to dismiss without prejudice.²⁰⁷

IV. 578 WEEKS OF TTD ALLOWED: *LOWELL V. JORDAN*

In *Lowell Health Care Center v. Jordan*,²⁰⁸ the court of appeals held that the claimant could recover in excess of 500 weeks of worker's compensation.²⁰⁹ Lowell Health Care Center appealed the full Worker's Compensation Board's adoption of a single hearing member decision awarding the claimant seventy-eight weeks of temporary total disability and 500 weeks of total permanent disability.²¹⁰

In March 1990, Jordan injured her back while attempting to move a wheelchair-bound patient. Lowell accepted the injury as compensable and paid temporary total disability compensation. The parties eventually disputed the amount of compensation payable. Section 22-3-3-8 of the Indiana Code provides:

With respect to injuries occurring on and after July 1, 1976, causing temporary total disability or total permanent disability for work, there shall be paid to the injured employee during the total disability a weekly compensation equal to sixty-six and two-thirds percent (66 2/3%) of his average weekly wages, as defined in [Indiana Code] 22-3-3-22, for a period not to exceed five hundred (500) weeks.²¹¹

At the same time, section 22-3-3-10(b) of the Indiana Code provides:

With respect to injuries in the following schedule occurring on and after July 1, 1989, and before July 1, 1990, the employee shall receive, in addition to

201. *Id.* at 568-69.

202. *Id.* at 569.

203. *Id.* at 570.

204. *Id.* at 569.

205. *Id.*

206. *Id.* at 570.

207. *Id.*

208. 641 N.E.2d 675 (Ind. Ct. App. 1994).

209. *Id.* at 678.

210. *Id.*

211. IND. CODE § 22-3-3-8 (1993) (emphasis added).

temporary total disability benefits not exceeding seventy-eight (78) weeks on account of the injury, a weekly compensation of sixty percent (60%) of the employee's average weekly wages, not to exceed one hundred eighty-three dollars (\$183) average weekly wages, for the period stated for the injury . . . [f]or injuries resulting in total permanent disability, five hundred (500) weeks.²¹²

Although section 22-3-3-8 limits awards to 500 weeks, section 22-3-3-10(b) provides for recovery of total permanent disability for 500 weeks, *in addition* to temporary total disability of seventy-eight weeks or less. The majority viewed these provisions as facially in conflict, and applied case law to resolve the issue. The court was bound to "adopt the construction which sustains the Act, carries out its purpose, and renders all parts thereof harmonious."²¹³ Under *State ex rel. Sendak v. Marion County Superior Court*,²¹⁴ the *Lowell* court looked to the most recent legislative action on the statutes in question, which was a 1988 amendment to section 22-3-3-10(b) providing the seventy-eight week period of TTD in addition to the 500 weeks payable for total permanent disability.²¹⁵ The court gave due deference to the Worker's Compensation Board's determination, and looked to the purpose of worker's compensation, which "is for the benefit of the employee and 'should be liberally construed so as not to negate the Act's humane purposes.'"²¹⁶ Thus, the majority affirmed the Full Board's award of 578 weeks of compensation.²¹⁷

Judge Riley dissented, finding no conflict between the two code sections. Riley stated: "As the majority concedes, [Indiana Code] 22-3-3-8 specifically limits a general award of total disability to 500 weeks Acceptance of the majority's interpretation of [Indiana Code] 22-3-3-10, ignores the unequivocal language of [Indiana Code] 22-3-3-8."²¹⁸

Riley reasoned that the application of section 22-3-3-10 is limited to cases involving scheduled injuries.²¹⁹ Because Jordan suffered a non-scheduled back injury, Riley argued that section 22-3-3-10 would not conflict with section 22-3-3-8, but would instead delineate a narrow exception to the general limitation within the operation of section 22-3-3-8.²²⁰ Furthermore, if the majority in *Lowell* is correct that the section 22-3-3-10(b) applies completely to permanent total disability and takes precedence over section 22-3-3-8, then the rate of payment for permanent disability would be sixty percent of the average weekly wage as provided in section 22-3-3-10(b), instead of 66 2/3% as provided in section 22-3-3-8.²²¹ Although the 1988 amendment to the Act opened up the possibility

212. *Id.* § 22-3-3-10(b) (emphasis added).

213. *Lowell*, 641 N.E.2d at 678 (citing *Holmes v. Review Bd. of Ind. Employment Sec. Div.*, 451 N.E.2d 83, 88 (Ind. Ct. App. 1983)).

214. 373 N.E.2d 145 (Ind. 1978) (holding that courts must look to the most recent legislative action to resolve statutory conflicts).

215. *Lowell*, 641 N.E.2d at 678.

216. *Id.* (citing *Frampton v. Central Ind. Gas Co.*, 297 N.E.2d 425, 427 (Ind. 1973)).

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. IND. CODE §§ 22-3-3-8, -10(b) (1993).

of a construction allowing in excess of 500 weeks, prior to that time, it was generally accepted in the worker's compensation community that awards were limited to 500 weeks of compensation.

V. APPEALS FROM DECISIONS OF THE FULL BOARD

A denial of benefits by the Full Board was overturned and remanded by the court of appeals in *Zike v. Onkyo Manufacturing, Inc.*²²² The court of appeals found that: 1) the board applied the improper standard in denying claim; 2) amendments to ODA establishing specific requirements for terminating benefits once begun could not be applied retroactively; and 3) denial of TTD could not be based on finding that claimant's condition became permanent and quiescent.²²³

In 1989, the plaintiff developed hypersensitized pneumonitis from exposure to soldering fumes. The Full Worker's Compensation Board adopted a single hearing member's findings that the workplace exposure caused the plaintiff's illness, and that the condition prevented her from resuming her job at Onkyo.²²⁴ It was found that the symptoms of the condition would subside approximately two weeks after an exposure, and at that point the plaintiff would no longer be incapacitated.²²⁵ The Board found that the plaintiff could work so long as she were not exposed to the soldering fumes, and was therefore not disabled.²²⁶ Accordingly, compensation was denied.²²⁷

On appeal, Zike argued that the Board erred in denying her claim by treating it as falling under Worker's Compensation rather than the ODA. Zike also contended that the 1991 amendments to the ODA should have been applied in her case. The court agreed that the Board erred in the treatment of her claim, and cited *Spaulding v. International Bakers Services, Inc.*²²⁸ for the premise that the standards for assessing disability under the Worker's Compensation Act and ODA are not identical.²²⁹ The court found that the evidence would not have supported the Board's decision under the proper standard.²³⁰ However, the court found that the amendments to the ODA did not apply to the claim because the claim arose before the amendment was enacted, and the amendment was not intended to apply retroactively.²³¹

Section 22-3-7-9(e) of the Indiana Code defines "disability" and "disablement" for purposes of the ODA as follows:

"[D]isablement" means the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he claims

222. 622 N.E.2d 1055 (Ind. Ct. App. 1993).

223. *Id.* at 1058.

224. *Id.* at 1057.

225. *Id.*

226. *Id.*

227. *Id.*

228. 550 N.E.2d 307, 308-10 (Ind. 1990).

229. *Zike*, 622 N.E.2d at 1057.

230. *Id.* at 1058.

231. *Id.*

compensation or equal wages in other suitable employment, and “disability” means the state of being so incapacitated.²³²

Following *Spaulding*, the court stated that the determination of disability under the Worker’s Compensation Act hinges on the capacity to work, whereas under the ODA the sine qua non is the capacity to earn wages.²³³ “While barely distinguishable, we are not prepared to declare that these standards will never require different results under appropriate facts.”²³⁴ While the evidence heard by the Full Board indicated that the plaintiff was capable of working at some type of employment, it did not support a determination that she could earn equal wages in other suitable employment that she was capable of performing.²³⁵

Finally, the opinion briefly discussed the applicability of permanence and quiescence under the ODA. Under the Worker’s Compensation Act, a finding that the employee’s condition is permanent and quiescent—that the injury will neither respond to further medical treatment nor worsen—may lead to the termination of temporary total disability payments. In the present case, the court anticipated that the issue of whether Zike’s condition was permanent and quiescent might arise on remand as the reason for Onkyo’s termination of TTD. It was noted that Onkyo contended that a determination as to permanence and quiescence is “as fully applicable to claims under the Occupational Diseases Act as it is to the Worker’s Compensation Act.”²³⁶ The court disagreed, stating “an occupational disease may not lend itself to a determination of permanence and quiescence.”²³⁷ Because the record showed that Zike’s occupational disease would continue to manifest itself under certain circumstances, the court stated that a finding of permanence and quiescence would be improper.²³⁸ The case was remanded for redetermination.²³⁹

In *Four Star Fabricators, Inc. v. Barrett*,²⁴⁰ the court addressed the issue of whether cumulative trauma injuries might be compensable where a degenerative physical condition develops in the workplace and later manifests itself as a debilitating injury outside of the workplace. Barrett worked as a burning machine operator at Four Star from 1984 through 1992. His work required him to maneuver, lift, and cut 100 to 200 pound steel plates, sometimes manually and sometimes with the assistance of pry bars or mechanical lifts. In 1988, Barrett was struck in the back by a piece of equipment and injured while lifting a plate. Barrett was treated and missed three days of work. Later, Four Star experienced a substantial increase in business that resulted in a proportional

232. IND. CODE § 22-3-7-9(e) (1993).

233. *Zike*, 622 N.E.2d at 1057-58.

234. *Id.* at 1058 (quoting *Spaulding v. International Bakers Svcs., Inc.*, 550 N.E.2d 307, 310 (Ind. 1990)).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. 638 N.E.2d 792 (Ind. Ct. App. 1994).

increase in the amount of lifting and bending Barrett was required to do, and he began experiencing back pain while working.²⁴¹

In April 1992, Barrett felt a sharp pain and a "pop" in his back when he stooped to pick up his infant. He was subsequently diagnosed with a herniated disk and did not return to work until November 1992. Barrett was awarded worker's compensation benefits by the Board.²⁴² On appeal, Four Star contended that evidence did not support the determination that there was a causal relationship between Barrett's injury and his employment, but that Barrett had merely suffered an unrelated accident at home.²⁴³

Section 22-3-2-2 of the Indiana Code grants compensation to employees for "personal injury or death by accident arising out of and in the course of employment."²⁴⁴ "Arising out of" refers to the origin and cause of the injury, while 'in the course of' means the time, place and circumstances under which the injury took place.²⁴⁵ Under these definitions, the court reasoned, Four Star relied too heavily on the fact that the "pop" in Barrett's back occurred at home.²⁴⁶ Furthermore, under *Yankeetown*, the "by accident" requirement was held to mean "the unexpected consequence of the usual exertion or exposure of the particular employee's job."²⁴⁷ Thus an injury may be compensable where it "happens day after day on the job and the combination of all the days [produces] the injurious result."²⁴⁸

Such "cumulative trauma" injuries may arise "in the course of employment" even though the employee is not working at the time the injury manifests itself.²⁴⁹ Instead, the facts of each case determine whether an injury arises in the course of employment, and in this case, evidence led to the conclusion that the injury was caused by his employment.²⁵⁰ He had been injured previously, had performed strenuous repetitive motions at an increased pace thereafter, and three physicians believed that his job was "related" to or "contributed" to his injury.²⁵¹

The court found that evidence was sufficient to show that the plaintiff had suffered injury by accident arising out of and in the course of employment.²⁵² The existence of the requisite causation of an injury is a question of fact for the Board and will not be disturbed

241. *Id.* at 794.

242. *Id.*

243. *Id.*

244. IND. CODE § 22-3-2-2 (1993).

245. *Barrett*, 638 N.E.2d at 795 (citing *Fields v. Cummins Fed. Credit Union*, 540 N.E.2d 631, 635 (Ind. Ct. App. 1989)).

246. *Id.*

247. *Id.* (citing *Evans v. Yankeetown Dock Corp.*, 491 N.E.2d 969, 974 (Ind. 1986)). *See supra* notes 19-37 and accompanying text.

248. *Id.* (citing *Union City Body Co. v. Lambdin*, 569 N.E.2d 373, 374 (Ind. Ct. App. 1991)).

249. *Id.*

250. *Id.* at 796.

251. *Id.*

252. *Id.*

if based on the evidence.²⁵³ Though one doctor stated his opinion in terms of "probability" that the injury was work-related, the opinion was sufficient to support the Board's factual conclusion.²⁵⁴

CONCLUSION

The cases discussed above, especially the Indiana Supreme Court decisions addressing the exclusive remedy provision, will affect the way attorneys approach civil and administrative claims arising out of work-related injuries. The low compensation levels available under the Indiana Worker's Compensation Act will continue to generate civil claims by injured workers. However, the court has clearly drawn the lines as to what claims against employers might be heard outside of the Worker's Compensation Act.

253. *Id.*

254. *Id.* at 796-97.

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ARTICLE

THE MERITS OF STATE ACTION IMMUNITY TO PROMOTE HOSPITAL COLLABORATION: REPORT OF THE HOSPITAL ANTITRUST TASK FORCE TO THE INDIANA STATE DEPARTMENT OF HEALTH

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INTRODUCTION

In the fall of 1993, the Indiana State Department of Health (ISDH) convened the Hospital Antitrust Task Force (“Task Force”) under the direction of the Center for Law and Health at Indiana University School of Law—Indianapolis to conduct a formal policy analysis of the impact of federal and state antitrust laws on collaborative efforts among hospitals and other health care providers. The Task Force was comprised of leading Indiana experts on health care antitrust law and key state policy makers.¹

The Task Force engaged in extensive fact-finding efforts to elicit the views of various health system constituencies on the merits of a state action exemption for hospital collaborative efforts under the antitrust laws. These fact-finding activities and the information they provided are described in this Article. The Task Force then developed

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1. Members of the Task Force were: Sydney Arak, Esq., Senior Vice President and General Counsel, Methodist Hospital of Indiana, Inc.; Ron Dyer, Esq., General Counsel, Indiana State Medical Association; John Render, Esq., Hall, Render, Killian, Heath & Lyman; Marc Rodwin, J.D., Ph.D., Associate Professor, Indiana University School of Public and Environmental Affairs; Geoffrey Segar, Esq., Ice, Miller, Donadio & Ryan; and Norman Tabler, Esq., Baker & Daniels. Eleanor D. Kinney, J.D., M.P.H., Professor of Law and Director, the Center for Law and Health, Indiana University School of Law—Indianapolis, chaired the Task Force and otherwise directed the project. Professor Kinney was assisted by Lisa Clark Copp, Assistant Director of the Center for Law and Health, and Marcia Gonzales, Senior Research Associate for the Center for Law and Health, who were responsible for drafting the following report. Task Force members representing the State of Indiana were: Attorney General Pam Carter; Myra Selby, Esq., Director of Health Care Policy, Office of the Governor; Nancy Blough, Esq., Deputy Health Commissioner, ISDH; Valita Fredland, Esq., Senior Policy Analyst, ISDH; and M. Elizabeth Carroll, Esq., Director of the Office of Legal Affairs, ISDH.

recommendations on whether and how to proceed with a state action exemption to promote hospital collaborative activities.

This Article summarizes the deliberations, findings and conclusions of the Task Force. First, this Article reviews relevant principles of antitrust law affecting hospital collaborative efforts. Second, this Article sets forth information about similar antitrust reform measures proposed by the Indiana Commission on State Health Policy, the President's proposed Health Security Act,² other federal legislative proposals before Congress, as well as proposals adopted in other states and proposals of the American Hospital Association and the American Medical Association. Third, this Article presents the Task Force's findings on problems that hospitals and other providers currently face under the antitrust laws in pursuing collaborative projects, and whether and how these projects would be facilitated under a legislatively created state action immunity. Finally, this Article presents the Task Force's conclusions and recommendations.

I. APPLICABLE PRINCIPLES OF ANTITRUST LAW

A dominant economic policy of the United States is to promote the system of free competition in the market place. Federal and state antitrust laws, described below, articulate this economic policy.³ The antitrust laws are designed to protect the economic system of competition and not individuals or economic entities. The specific way in which the antitrust laws accomplish this goal is to prohibit private conduct, particularly joint conduct of competitors, that restrains trade or impedes competition in markets for goods and services. The theory is that competition generates more goods and services at lower prices thus empowering the consumer who has choices about goods and services.

This policy prevails unless Congress or a state legislature determines that the free market is not working to meet consumer needs or other policy goals, and establishes a regulatory program that intervenes in the market and modifies competition in some fashion to achieve another policy goal. The central issue that the Task Force deliberated pertains to whether there is a policy goal besides free competition in the market place that the state of Indiana ought to promote in the market for in-state hospital services.

Antitrust analysis distinguishes between two types of restraints that are important in understanding hospital collaboration issues. Horizontal restraints are combinations among competitors at the same level of production or distribution. Applicable examples of horizontal restraints in the hospital field include agreements among hospitals to charge the

2. H.R. 3600, Health Security Act, 103d Cong., 1st Sess. (1993).

3. We are indebted to several excellent sources for our discussion of the federal antitrust laws. These sources include: AMERICAN HOSPITAL ASSOCIATION, HOSPITAL COLLABORATION: THE NEED FOR AN APPROPRIATE ANTITRUST POLICY (1992) [hereinafter HOSPITAL COLLABORATION]; BARRY R. FURROW AND SANDRA H. JOHNSON, THE LAW OF HEALTH CARE ORGANIZATION AND FINANCE (1992); CLARK C. HAVIGHURST, HEALTH CARE LAW AND POLICY (1988); Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51 LAW & CONTEMP. PROBS. 93 (1988); Frances H. Miller, *Vertical Restraints and Powerful Health Insurers: Exclusionary Conduct Masquerading as Managed Care?*, 51 LAW & CONTEMP. PROBS. 195 (1988); and Donald R. Schmidt, *Hospital Antitrust Compliance Programs*, in ABA SECTION OF ANTITRUST LAW, ANTITRUST HEALTH CARE: ENFORCEMENT AND ANALYSIS 275 (1992) [hereinafter ANTITRUST HEALTH CARE].

same rates for hospital services or not to develop ancillary services offered by the other. Further, attempts by various combinations of physicians on the same hospital medical staff to exclude patients of non-physician health care professionals or to inappropriately exclude physicians from membership on the medical staff may constitute horizontal restraints. Vertical restraints involve concerted action between competitors at different levels of production or distribution, such as between buyers and sellers or manufacturers and retailers. In the health care field, the combination of hospitals with other types of health care providers, *e.g.*, physicians, long term care facilities, etc., could constitute vertical restraints. Generally, horizontal restraints are more offensive under the antitrust laws than vertical restraints.

At one time, the federal antitrust laws did not regularly apply to the field of health care because of the operation of various defenses to the antitrust laws outlined below, *e.g.*, the learned professions doctrine, the interstate commerce requirement, and the exemption for the business of insurance. However, in a number of cases since 1975, including *Goldfarb v. Virginia State Bar*,⁴ *Arizona v. Maricopa County Medical Society*⁵ and *Patrick v. Burget*,⁶ the Supreme Court has made clear that the health care industry will be treated the same as any other industry.

A. Antitrust Statutes

1. *Federal Antitrust Statutes*.—The most important antitrust statute pertaining to hospital collaboration is section 1 of the Sherman Act, which provides: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."⁷ This section requires the participation of two or more entities, which can be persons, corporations, partnerships or associations. Proscribed activities under the Sherman Act must occur in interstate commerce. The analysis of Sherman Act section 1 violations is described *infra*.⁸ Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize.⁹ To prove a section 2 violation of illegal monopolization requires a demonstration that the offending competitor has sufficient market power to enable it to preclude competition or control price. To succeed under section 2, the plaintiff must also establish an actual intent to control the market on the part of the defendant and that the defendant's expansion is not due to growth or development resulting from a superior product or business acumen. The Sherman Act can be enforced in three ways. The first way is civil suits brought by the U.S. Department of Justice's Antitrust Division (DOJ). The second way is private suits brought by damaged competitors who can recover treble damages if successful. The Federal Trade Commission (FTC) also enforces the Sherman Act in the manner described below. The Sherman Act also imposes criminal liability for especially egregious violations. Private actions by disappointed competitors, rather than government prosecution, pose a graver

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4. 421 U.S. 773 (1975).
 5. 457 U.S. 332 (1982).
 6. 486 U.S. 94 (1988).
 7. 15 U.S.C. § 1 (Supp. 1994).
 8. See *infra* subpart I.B.
 9. 15 U.S.C. § 2 (Supp. 1994).

threat to hospital collaborators, which is an important factor in assessing potential antitrust exposure from a hospital collaboration.

Section 3 of the Clayton Act prohibits a seller from dealing with a customer on the conditions that the customer not deal in goods of a competitor, where the effect of such a transaction may substantially lessen competition or tend to create a monopoly in any type of commerce. Exclusive dealing contracts, tying arrangements, requirements contracts, and other related agreements are covered by this provision. Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce . . . in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."¹⁰ Since section 7 applies to "incipient" or developing violations, demonstrating actual anti-competitive effects may not be necessary. An acquisition is unlawful if the anti-competitive effect is reasonably probable.¹¹ The Clayton Act is enforced through civil suits for injunctions or damages brought by the DOJ, FTC enforcement proceedings, and private suits for treble damages. The Clayton Act does not provide for criminal liability.

The FTC Act prohibits unfair methods of competition and unfair deceptive acts or practices.¹² Unlike other federal antitrust statutes, the FTC Act is enforced by the FTC, an administrative agency. Section 5 of the FTC Act has been interpreted to grant the FTC authority to enforce the Sherman Act and the Clayton Act. Notably, the FTC has jurisdiction over not-for-profit organizations for purposes of enforcing the merger provisions of the Clayton Act.

2. *State Antitrust Laws.*—State enforcement may be based on either state or federal antitrust laws. All states except Pennsylvania and Vermont have an antitrust statute of general application.¹³ These statutes all contain provisions similar to section 1 of the Sherman Act, and most have sections similar to section 2 of the Sherman Act. Indiana's antitrust statute is similar and promotes the same economic policy, *i.e.*, promotion of free competition in the market.¹⁴ Specifically, Indiana's antitrust statute tracts the language of the Sherman Act section 1.¹⁵ Indiana's statute, like that of most other states, is enforced by the State Attorney General.

B. Antitrust Analysis Under Section 1 of the Sherman Act

In analyzing violations of section 1 of the Sherman Act, courts distinguish between two types of violations. *Per se* offenses are agreements that by nature are so plainly anti-competitive that no elaborate inquiry is needed to establish their illegality. Examples of *per se* violations include: price-fixing, division of markets, tying arrangements, and certain boycotts or refusals to deal.

Activities that are not within the *per se* offenses are subject to inquiry under the rule of reason analysis. The classic articulation of the rule of reason analysis is found in

10. 15 U.S.C. § 18 (Supp. 1994).

11. *Hospital Corporation of America*, 3 Trade Reg. Rep. (CCH) ¶ 22,301 (FTC Oct. 25, 1985).

12. 15 U.S.C. § 45 (1988).

13. Ellen S. Cooper, *Trends in State Antitrust Enforcement Related to Health Care*, in ANTITRUST HEALTH CARE, *supra* note 3, at 183.

14. IND. CODE § 24-1-1-1 to 1-6 (1993).

15. *Orion's Belt, Inc. v. Kayser-Roth Corp.*, 433 F. Supp. 301 (S.D. Ind. 1977).

Justice Brandeis's opinion in *Chicago Board of Trade v. United States*, in which he stated that:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business.¹⁶

The application of the rule of reason requires a balancing of a restraint's pro-competitive effects against its anti-competitive effects. This analysis focuses on the challenged restraint's impact on competition and, thus, the relevant factors in a rule of reason inquiry are those that relate to the competitive consequences of the restraint. They include: the purpose of the particular arrangement, the market power of the parties, the availability of a less restrictive alternative, and the arrangement's pro-competitive and anti-competitive effects. The purpose of the analysis is not to decide whether the policy of the antitrust laws promoting competition is in the public interest because that decision is reserved for Congress.¹⁷

An analysis of market power has assumed increasing importance in the resolution of health care antitrust cases under the rule of reason, and in merger and monopolization cases.¹⁸ Market power is the ability of the parties to a restraint, acting collectively, to raise prices or otherwise determine terms of trade in the market. A proper market definition permits determination of how much of the market is supplied by the defendant and how easily the defendant can manipulate price and output, *i.e.*, exercise market power. Measurement of market power is technically difficult, requiring consideration of many issues. Further, the law pertaining to market definition and power has changed considerably in recent years. A full analysis of market definition and power is beyond the scope of this article; several other articles provide an excellent discussion of the issues involved in determining market definition and power.¹⁹ Two antitrust cases involving Indiana health care providers have been very important in the development of the law on the definition of markets in health care antitrust cases.²⁰

16. 246 U.S. 231, 238 (1918).

17. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 689 (1978); *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628, 649 (D.C. 1979) (A restraint "cannot be justified by reference to social goals other than competition.").

18. For excellent discussions of market issues in antitrust analysis, see, e.g., Neil P. Motenko, *Market Definition and Market Power*, in *ANTITRUST HEALTH CARE*, *supra* note 3, at 139; William Blumenthal, *Relevant Markets in the Health Care Industry*, in *ABA SECTION OF ANTITRUST LAW, DEVELOPMENTS IN ANTITRUST HEALTH CARE LAW* (1990).

19. See, e.g., Jonathan B. Baker, *The Antitrust Analysis of Hospital Mergers and the Transformation of the Hospital Industry*, 51 LAW & CONTEMP. PROBS. 93 (1988); Michael Morrisey et al., *Defining Geographic Markets for Hospital Care*, 51 LAW & CONTEMP. PROBS. 165 (1988); Motenko, *supra* note 18; Kevin J. Arquit, *Market Power Analysis in Health Care Cases*, in *ANTITRUST HEALTH CARE*, *supra* note 3, at 131.

20. See *Indiana Fed'n of Dentists v. Federal Trade Comm'n* 745 F.2d 1124 (7th Cir. 1984); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325 (7th Cir. 1986).

C. Defenses in Antitrust Actions

1. *Interstate Commerce.*—Congress's power to restrain business activities under the federal antitrust laws is derived from its authority to regulate interstate commerce. In *Hospital Building Co. v. Trustees of Rex Hospital*,²¹ the Supreme Court ruled that the interstate commerce defense did not preclude application of the antitrust laws to actors, such as hospitals, operating in small geographic areas within one state essentially because of the economic impact of the actors on the national economy. Consequently, general, collaborative efforts involving hospitals have the requisite effect on interstate commerce to come under the antitrust laws.²²

2. *Learned Professions Exemption and the Per Se Application.*—In *Goldfarb v. Virginia State Bar*,²³ the Supreme Court stated that the learned professions are not exempt from the antitrust laws. Although the courts are reluctant to carve out a definite exemption for conduct of the learned professions, they have held that in regard to professional associations the nature and extent of the restraint's anti-competitive effect was too uncertain to warrant per se treatment.²⁴ This is not to say that learned professions are exempt from the per se application. Rather, it is more accurate to state that where learned professions are involved, the courts are less likely to apply the per se rule. In *Arizona v. Maricopa County Medical Society*,²⁵ the Court stated that conduct that was traditionally subject to per se condemnation under section 1 of the Sherman Act would instead be subject to the rule of reason analysis where the conduct was "premised on public service or ethical norms."²⁶ As such, the courts have been generally reluctant to make a per se application to a significant number of health care circumstances.

3. *Business of Insurance Defense.*—The McCarran-Ferguson Act²⁷ provides an exemption from federal antitrust laws for the "business of insurance."²⁸ To fall within this exemption, the challenged activity must: (1) constitute the business of insurance; (2) be regulated under state law; and, (3) not constitute a boycott, coercion, or intimidation. The exemption will apply only to conduct that specifically involves the spreading and taking of risk and not cost containment practices of health insurers.²⁹

21. 425 U.S. 738 (1976).

22. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991).

23. 421 U.S. 773 (1975).

24. See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Wilk v. AMA*, 895 F.2d 352 (1990).

25. 457 U.S. 332 (1982).

26. *Id.* at 349.

27. 15 U.S.C. §§ 1011-1015 (1988).

28. 15 U.S.C. § 1012(b) (1988).

29. See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) (The Court applied three criteria for determining whether a particular practice is exempt as the "business of insurance": whether the practice has an effect of spreading or underwriting risk, whether it is an integral part of the policy relationship between the insurer and the insured, and whether it is limited to the insurance industry.); see also *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982) (The Court held that the use of peer review committees did not constitute the spreading or underwriting of risk.).

4. *Implied Repeal.*—Another important defense to the federal antitrust laws is implied repeal, which arises when Congress has adopted a comprehensive regulatory scheme that is inconsistent with the antitrust laws. The Supreme Court declined to find that the federally mandated health planning and Certificate of Need program established by the National Health Planning and Resources Development Act of 1974³⁰ did not constitute an implied repeal of the federal antitrust laws.³¹

D. State Action Immunity

In *Parker v. Brown*, the Supreme Court articulated the state action exemption under the federal antitrust laws. This case involved a California program that regulated production and marketing of raisins by the state's growers. The state legislature delegated implementation of the program to a commission, which was authorized to adopt programs to restrict competition among growers and to maintain prices in the distribution of raisins to packers. The purpose of the statute was to conserve agricultural wealth and prevent economic waste. The Supreme Court held that the Sherman Act did not apply since the program derived its authority from the state's legislative command.³²

The two requirements for state action immunity that were pronounced in *Parker v. Brown* were more specifically expressed in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*³³ First, the restraint must be clearly articulated and affirmatively expressed as state policy, and second, the policy must be actively supervised by the state itself.

1. *Clear Articulation of State Policy.*—In *Southern Motor Carriers Rate Conference, Inc. v. United States*,³⁴ the Supreme Court discussed the first prong of the *Midcal* test in determining that the collective rate-making regulatory structure of the states involved was entitled to state action immunity. The Court stated: "A private party acting pursuant to an anti-competitive regulatory program need not 'point to a specific, detailed legislative authorization' for its challenged conduct. As long as the State as a sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied."³⁵ If a state's intent to establish an anti-competitive regulatory program is clear, the state's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

2. *Active Supervision.*—In *Federal Trade Commission v. Ticor Insurance Co.*, the Supreme Court held that "the purpose of the active supervision inquiry is not to determine whether the state has met some normative standard, such as efficiency, in its regulatory practices," but whether the state has exercised sufficient judgment and control.³⁶ Under *Ticor*, the active supervision requirement mandates that the state exercise ultimate control

30. National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (1975).

31. National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378 (1981).

32. *Parker v. Brown*, 317 U.S. 341 (1943).

33. 445 U.S. 97 (1980).

34. 471 U.S. 48 (1985).

35. *Id.* at 63 (quoting *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978)).

36. *Federal Trade Comm'n v. Ticor Ins. Co.*, 504 U.S. 621, 622 (1992).

over the challenged anti-competitive conduct; the mere presence of some state involvement or monitoring does not suffice.

In *Midcal*,³⁷ the Supreme Court held that no antitrust immunity had been conferred since the state did not actively supervise the policy. Specifically, the Court found that the state did not establish prices, review the reasonableness of price standards, regulate terms of fair trade contracts, monitor market conditions nor engage in any pointed reexamination of the program. As a result, no state action immunity existed. Further, the Court stated: "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."³⁸

In *Patrick v. Burget*,³⁹ the Court refused to find active state supervision where the state agencies lacked the power to review the merits of private peer review decisions or their compliance with peer review procedures. Thus, the Supreme Court held that the state action doctrine did not protect Oregon physicians from antitrust liability for their activities in relation to hospital peer review decision proceedings. *Patrick* further defined the parameters of the active supervision prong of the state action immunity test by requiring that the government have veto power over the specific decisions of private parties on the substantive merits rather than just the procedural adequacies.

II. ANTITRUST DEVELOPMENTS AT THE FEDERAL LEVEL

The policy goals of the federal antitrust laws are currently in flux.⁴⁰ Specifically, some have argued that efficiency should be an important criterion in assessing whether a merger or other combination conforms to the antitrust laws. This position greatly influenced antitrust enforcement during the Reagan-Bush administrations. Others have attacked this emphasis on efficiency and urge that antitrust enforcement promotes more consumer-oriented goals, such as prevention of anti-competitive conduct. Following the election of a Democratic administration, policy goals in the enforcement of the antitrust laws at the federal level may be revised. In any event, the basic tenets of antitrust policy are unsettled, causing uncertainty about how antitrust principles will be applied to hospital mergers and other collaborative efforts.

A. Department of Justice Guidelines on Mergers and Acquisitions

In 1968, the Department of Justice developed Merger Guidelines for the purpose of evaluating the potentially anti-competitive effects of mergers. Subsequently, the DOJ issued guidelines in 1982, which were revised in 1984. These Guidelines outline the present enforcement of the DOJ and the FTC concerning horizontal acquisitions and mergers subject to section 7 of the Clayton Act, section 1 of the Sherman Act, and section 5 of the FTC Act. The 1984 revision of the 1982 DOJ Guidelines on Mergers and

37. 445 U.S. 97 (1980).

38. *Id.* at 104 (quoting *Goldfarb v. Virginia*, 421 U.S. 773, 791 (1975)).

39. 486 U.S. 94 (1988).

40. Baker, *supra* note 3, at 100-06.

Acquisitions reflect the policy goal of efficiency discussed above. The 1992 DOJ merger guidelines, however, do not reflect major policy shifts.⁴¹

*B. Department of Justice/Federal Trade Commission Safety Zones
for the Health Care Industry*

In September 1993, the DOJ and FTC issued a set of antitrust enforcement guidelines for the health care industry. These guidelines outline six industry-specific "safety zones."⁴² If a provider's proposed business venture meets the requirements of one of the established safety zones, then neither the DOJ nor FTC will challenge the proposed activity, absent extraordinary circumstances. The six safety zones are as follows:

- (1) Mergers between two general acute-care hospitals where one of the hospitals (1) has an average of fewer than 100 licensed beds over the three most recent years, and (2) has an average daily inpatient census of fewer than [forty] patients over the most three recent years;
- (2) Any joint venture among hospitals to purchase, operate and market the services of high-technology or other expensive medical equipment if the joint venture includes only the number of hospitals whose participation is needed to support the equipment;
- (3) Physicians' collective provision of information that may improve purchasers' resolution of issues relating to the mode, quality, or efficiency of treatment;
- (4) Participation by competing hospitals in surveys of prices for hospital services, or surveys of salaries, wages or benefits of hospital personnel . . . so long as certain conditions are satisfied;
- (5) Any joint purchasing arrangement among health care providers where two conditions are present: (1) the purchases account for less than [thirty-five] percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts

41. U.S. Dep't. of Justice Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569-20,571 (1994).

42. U.S. DEP'T OF JUSTICE & THE FEDERAL TRADE COMMISSION, STATEMENTS OF ANTITRUST ENFORCEMENT POLICY IN HEALTHCARE (1993) [hereinafter STATEMENTS]. On September 27, 1994, the U.S. Department of Justice and the Federal Trade Commission issued new statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust. These statements modified several of the six safety zones outlined in its 1993 Statement. One important change was a new guideline explaining the analysis that the FTC and DOJ would use in reviewing hospital joint ventures involving specialized clinical or other expensive health care service. Other provisions provided greater protection for physicians in negotiating with other providers and, particularly, payers. See 1994 WL 642477 (F.T.C.); 4 Trade Reg. Rep. (CCH) ¶ 13,152, at 20,769-20,798 (1994). For a good review of the 1994 Statements, see Clifton E. Johnson, *Revised Federal Antitrust Enforcement Policy Statements Issued for the Health Care Industry*, HALL, RENDER, KILLIAN, HEATH & LYMAN, DEVELOPMENTS IN HEALTH LAW (Oct. 24, 1994).

for less than [twenty] percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement;

(6) A physician network comprised of [twenty] percent or less of the physicians in each physician specialty with active hospital staff privileges who practice in the relevant geographic market and share substantial financial risk.⁴³

C. President Clinton's Health Reform Proposal: The Health Security Act Impact on Antitrust Enforcement

The Clinton health plan asserted that the federal antitrust laws will ensure that the new health care system remains in a competitive environment. But the plan acknowledged that the antitrust laws must be clarified to give providers confidence that their collaborative activities are legal.⁴⁴ The Clinton Health Plan references to antitrust reform are as follows:

1. *Hospital Mergers.*—Hospitals smaller than a certain size, as measured, for example, by number of beds or patient census, require certainty that they will not be challenged by the federal government if they attempt to merge. Such hospitals often are sole community providers that do not compete with other hospitals.

The DOJ and the FTC publish guidelines providing safety zones for such mergers and an expedited business review or advisory opinion procedure through which the parties to such mergers can obtain timely (*i.e.*, within ninety days) additional assurance that their merger will not be challenged. Guidelines also would provide the analysis the agencies use to evaluate mergers among larger hospitals.

2. *Hospital Joint Ventures and Purchasing Arrangements.*—Hospitals may enter into joint ventures involving high technology or expensive equipment and ancillary services, as well as joint purchasing arrangements involving the goods and services they need.

The DOJ and the FTC publish guidelines that provide safety zones for such joint ventures and arrangements, examples of ventures that would not be challenged by the agencies and an expedited business review or advisory opinion procedure through which the parties to joint ventures can obtain timely (*i.e.*, within ninety days) advice and assurance as to whether ventures that do not fall within the safety zones will be challenged.

3. *Physician Network Joint Ventures.*—Physicians and other providers require additional guidance regarding the application of the antitrust laws to their formation of provider networks that would negotiate effectively with health plans.

The DOJ and the FTC publish guidelines that provide safety zones for physician network joint ventures that do not possess market power (below twenty percent) and that share financial risk, examples of networks that would not be challenged by the agencies, and an expedited business review or advisory opinion procedure through which the parties to networks that do not fall within the safety zones can obtain timely (*i.e.*, within ninety days) advice and assurance as to whether their network will be challenged.

43. STATEMENTS, *supra* note 42.

44. President Clinton's Health Care Reform Proposal—Preliminary Working Group Draft of September 7, 1993, Appendix A at A-62 - A-64.

Within the safety zones, physicians may bargain collectively with health plans about payment, coverage, decisions about medical care, and other matters without fear of the antitrust laws.

4. *Provider Collaboration.*—During the transition to a new health care system, physicians and other providers may require some protection to negotiate effectively with health plans and to form their own plans. To protect physicians from the market power of third party payers forming health plans, providers are provided a narrow safe harbor within which to establish and negotiate prices if the providers share financial risk. The financial risk may not be simply fee discounting. Physicians who provide health services for the benefit package may combine to establish or negotiate prices for the health services offered if the providers share risk and if the combined market power of the providers does not exceed twenty percent. This safe harbor would not apply to the implicit or explicit threat of a boycott.

5. *State Action Immunity.*—The DOJ and the FTC publish guidelines that apply the state action doctrine where a state seeks to grant antitrust immunity to hospitals and other institutional health providers. If a state establishes a clearly articulated and affirmatively expressed policy to replace competition with regulation and actively supervises the arrangements, the hospitals and other institutional providers involved would have certainty that they will not face enforcement action by the federal government.

6. *Provider Fee Schedule Negotiation.*—The DOJ and the FTC publish guidelines that describe under existing law the ability of providers to collectively negotiate fee schedules with the alliances. Alliances, as established and supervised under state law, are required under federal law to establish a fee schedule for fee-for-service plans, and providers, in order to participate in the negotiation process, need certainty that their actions will not violate the antitrust laws.

7. *McCarran-Ferguson.*—The current exemption from the antitrust laws enjoyed by health insurers under the McCarran-Ferguson Act⁴⁵ would be repealed, eliminating the ability of health plans to collectively determine the rates they charge and other terms of their relationship with providers.

*D. Other Federal Health Care Proposals before the 103rd Congress
that Addressed Antitrust Enforcement*

1. *Hospital Cooperative Agreement Act.*—The Hospital Cooperative Agreement Act,⁴⁶ introduced by Senator Cohen (R-Me.) would have established a demonstration program with grants for collaboration among hospitals regarding the provision of expensive, capital-intensive medical technology or other highly resource-intensive services. Three of these grants must be used to demonstrate how the collaborative agreements will be used to increase access or quality in rural areas. The purpose of this Act was to encourage cooperation among hospitals in order to contain costs and achieve a more efficient health care delivery system by eliminating unnecessary duplication and an increase of costly medical or highly technology services or equipment. The Act stated that it shall not be an antitrust violation for a hospital to enter into and carry out activities under a cooperative agreement if it meets the Act's specifications. This Act required that

45. See *supra* notes 27-28 and accompanying text.

46. Hospital Cooperative Agreement Act, S. 493, 103rd Cong., 1st Sess. (1993).

projects be designed to demonstrate a reduction in costs, an increase in access to care, and improvements in the quality of care.

2. *Managed Competition Act of 1993.*—The Managed Competition Act of 1993,⁴⁷ introduced by Representative Cooper (D-Tenn.) was targeted at promoting pure managed competition where greater reliance is placed on the private sector to provide care, reduce costs and limit government control. The bill contained many health reform features similar to the President's proposal, *e.g.*, creation of accountable health plans and health insurance purchasing organizations. The bill required the administration to provide guidelines regarding the application of antitrust statutes to the accountable health plans in review by the DOJ. Joint ventures could be created for the purpose of sharing the provision of health care services that would involve substantial integration or financial risk-sharing. However, the exchange of information or conduct that is not necessary to the venture would be excluded. A certificate of public advantage must be obtained showing that the likely benefits will outweigh the reduction in competition that will result. This certificate of public advantage would be issued by the DOJ to the approved venture, which would preclude any exposure to antitrust liability. This certification would be issued within thirty days of application. An appeals process would be structured in the event that a denial or revocation of the certificate arises.

3. *Access to Affordable Health Care Act.*—Title IV of the Access to Affordable Health Care Act,⁴⁸ also introduced by Senator Cohen, entitled "Cooperative Agreements Between Hospitals," purported to encourage cooperation between hospitals in order to contain costs and achieve a more efficient health care delivery system through the elimination of unnecessary duplication and proliferation of expensive medical or high technology services or equipment. The United States Attorney General may grant a waiver of the antitrust laws, to permit two or more hospitals to enter into a voluntary cooperative agreement under which such hospitals provide for the sharing of medical technology and services. The administrator of the Agency for Health Care Policy and Research would evaluate applications for waiver approval within ninety days. Approval of the waiver would depend on whether cost reduction, quality enhancement, improvements in cost-effectiveness of high technology services, the avoidance of duplication and efficient utilization of hospital resources would likely result.

4. *Affordable Health Care Now Act of 1993.*—The Affordable Health Care Now Act of 1993,⁴⁹ introduced by Representative Michel (R-Ill.) would allow health care providers entering into joint ventures to receive antitrust exemptions. The "Removing Antitrust Impediments" section describes a system in which the United States Attorney General would develop guidelines where parties could apply for a limited exemption. The applications would be reviewed and answered within thirty days. If the application is denied, the United States Attorney must provide a statement of reasons and must enter notice in the Federal Register. Information relating to the joint venture must be publicly

47. Managed Competition Act of 1993, H.R. 3222, 103rd Cong., 1st Sess. (1993).

48. Access to Affordable Health Care Act, S. 223, 103rd Cong., 1st Sess. (1993).

49. The Affordable Health Care Now Act of 1993, H.R. 3080, 103rd Cong., 1st Sess. (1993). *See also* Republicans' Health Care Bill Includes Antitrust Exemptions for Joint Ventures, 65 Antitrust and Trade Reg. Rep. (BNA) 393 (Sept. 23, 1993).

available unless otherwise necessary to assist with a legal investigation or for a judicial or administrative proceeding.

The guidelines for implementation would be developed in conjunction with the Secretary of Health and Human Services and an Interagency Advisory Committee on Competition, Antitrust Policy, and Health Care. This advisory committee would include representatives from HHS, the DOJ, the Office of Management and Budget and the FTC. The limited exemption would reduce the actual damages if the conduct resulting in the antitrust claim was within the scope of the joint venture. This conduct would be subject to the rule of reason test,⁵⁰ taking into account all relevant factors affecting competition, including effects on competition in properly defined, relevant research, development, product, process, and service markets.

Additionally, a certificate of public advantage may be issued which would provide complete exemption to joint ventures. In order to receive a certificate of public advantage, it must be shown that the benefits of the joint venture are likely to outweigh the reduction in competition and that the reduction in competition is reasonably necessary to obtain such benefits. In addition, the application for the full exemption must include agreements by the parties that the venture will not foreclose competition through contracts that prevent other health care providers from competing with the venture, and that the venture will submit an annual report that describes its operation and information regarding the impact of the venture on health care and competition in health care. A denial for a certificate can be challenged in a United States District Court.

5. *Health Care Antitrust Improvements Act.*—The Health Care Antitrust Improvements Act,⁵¹ introduced by Senator Hatch (R-Utah) would allow an exemption from antitrust laws if the activity falls under one of the proscribed safe harbors listed in the Act, an additional safe harbor designated by the United States Attorney General, or is within the parameters of the specified activities stated in the certificate of review issued by the United States Attorney General. The safe harbors listed under section 5 of the Act were:

- (1) Combinations where each type or specialty provider in question does not exceed [twenty] percent of the total number of such type of specialty in the relevant market area;
- (2) Activities of medical self-regulatory entities relating to the standard setting or enforcement activities designed to promote quality of care;
- (3) Participation in surveys regarding the price of services, reimbursement levels or the compensation and benefits of employees and personnel if the survey is conducted in an unbiased manner by a third party and the information is based on prior and not current charges or benefits;
- (4) Joint ventures for high technology and costly equipment and services if the number of participants in the venture does not exceed the lowest number necessary to support the venture;

50. *See supra* subpart I.B.

51. Health Care Antitrust Improvements Act, S. 1658, 103rd Cong., 1st Sess. (1993). *See also* the companion bill introduced in the House by Rep. Archer, H.R. 3486, 103rd Cong., 1st Sess. (1993).

- (5) Hospital mergers relating to two hospitals if within the three-year period prior to the merger, at least one hospital had an average of 150 or fewer operational beds and the average inpatient use was less than [fifty] percent;
- (6) Joint purchasing arrangements if the total sales of the product or service is less than [thirty-five] percent of the relevant market;
- (7) Any good faith negotiations necessary to carry out any of the activities within the safe harbors listed or designated by the U.S. Attorney General or activities that are the subject of an application for a certificate of review.⁵²

In determining whether an additional safe harbor would be established, the United States Attorney General shall take into account the extent to which the collaborative activity would result in increased access, quality, cost efficiencies, the ability to provide services in medically underserved areas and improved utilization of health care resources. Further, criteria to be considered were whether the activity will improve payment and service arrangements so as to reduce cost, whether competition will be unduly restricted, whether comparable efficiencies exist; and, whether the activity will unreasonably foreclose competition.

E. National Trade Associations Proposals

Both the American Medical Association (AMA) and the American Hospital Association (AHA) have developed recommendations for health reform that include references to federal antitrust laws acting as barriers to collaborative activities by providers.

1. *The American Hospital Association.*—The AHA has been pursuing antitrust relief on the federal level. It has also urged hospitals to collaborate with each other, other health care providers, schools, businesses, and community organizations to improve the quality of and access to health care, and to reduce rising health care-related costs.⁵³ However, many such activities have been inhibited due to the real and perceived barriers of the federal antitrust laws.

The AHA is currently attempting to further educate providers about the risks of antitrust enforcement to provider collaboration. The association has issued several documents addressing these issues recently. But the AHA states that no amount of educational efforts can resolve the uncertainties that are inherent in the federal antitrust laws nor change the laws' preference for competition even when such competition results in a wasteful use of resources.

The AHA's examination of the methods of antitrust analysis is especially mindful of the unique characteristics of hospital markets. Hospital markets have traditionally deviated from the competitive paradigm in several important respects. Consumers are insulated from market prices by third-party insurance and lack of information. Due to the large amount of government-purchased medical care, for which the government pays on a set basis, hospitals with market power may be constrained to exercise such power. In addition, a hospital's mission may limit its ability to exercise market power. Moreover,

52. Health Care Antitrust Improvements Act, S. 1658, 103rd Cong. 1st Sess. (1993).

53. See HOSPITAL COLLABORATION, *supra* note 3.

the AHA recognizes that antitrust policy must be sensitive to non-economic priorities in health care. For example, the operation of market forces may not ensure that the right hospitals stay open and the right hospitals close. Hospital closures in underserved areas will complicate already serious problems with access to quality health care.

2. *The American Medical Association.*—In the spring of 1993, the AMA addressed the Subcommittee on Antitrust, Monopolies and Business Rights of the Judiciary Committee of the United States Senate on the subject of antitrust relief for the health care industry.⁵⁴ In its proposal the AMA did not seek an exemption for federal antitrust laws. Rather, the AMA recommended clarification of federal antitrust laws by statutory enactment.

Because health system reform will begin dictating the use of new pro-competitive approaches to the delivery of affordable medical care, the AMA strongly recommended changes to the current antitrust environment. Under managed competition, substantial efficiencies must be created, making cooperation among providers and physicians imperative. Relief from the barriers of federal antitrust laws will permit physicians to form networks and will provide valuable input into the policy-making activities of managed care plans.

F. Antitrust Reforms at the State Level

To date, more than a dozen states legislatively exempt health care collaborative activities from the coverage of the federal antitrust laws in one form or another.⁵⁵ The primary bases for creating a state action exemption from federal and state antitrust laws in each of these states have been relatively consistent. Various legislatures have concluded that the competitive model has not been effective in controlling the rising cost of health care nor the inefficiencies of duplicative facilities and services. Although technological and scientific advancements in the health care industry have improved the quality of health care, many persons cannot afford to take advantage of these improvements. Further, many states have found that the boundaries of existing state and federal health care statutes have suppressed the ability of health care providers, specifically hospitals, to acquire and develop new equipment and methodologies in the delivery of health care services. Therefore, the states have enacted legislation creating regulatory programs that allow health care providers to cooperate to the extent that the positive effects—such as the quality, access and delivery of health care services—do not outweigh the potential adverse effects of reducing competition.

Maine enacted the Hospital Cooperation Act of 1992,⁵⁶ which became effective in April the same year. This law allows hospitals to enter into cooperative agreements with other state-based hospitals if the potential benefits outweigh the disadvantages that may

54. American Medical Association, Statement to the Subcommittee on Antitrust, Monopolies and Business Rights, Judiciary Committee, United States Senate (March 23, 1993).

55. States that have enacted statutes that allow cooperative activity among hospitals include: Colorado, Florida, Georgia, Idaho, Kansas, Maine, Minnesota, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oregon, Tennessee, Texas, Washington, and Wisconsin. See GENERAL ACCOUNTING OFFICE, HEALTH CARE: FEDERAL AND STATE ANTITRUST ACTIONS CONCERNING THE HEALTH CARE INDUSTRY (August 1994).

56. ME. REV. STAT. ANN. tit. 22, § 1881-1888 (West 1994).

result from the reduction in competition. The benefits listed include quality, cost efficiency, avoidance of duplication, improvements in utilization and preservation of hospital facilities. The disadvantages to be considered include the likely adverse impact on the ability of managed care entities and payers to negotiate optimal payment and service arrangements with hospitals or other health providers; the reduction in competition in the quality, availability and price of health care services; and, the availability of less restrictive arrangements that can achieve the same or more favorable benefits. Those seeking to enter into cooperative agreements must demonstrate by clear and convincing evidence that the likely benefits of the proposed arrangement outweigh the attributable disadvantages in the reduction of competition. The Act defines a cooperative agreement among hospitals as the sharing, allocation or referral of patients, personnel, services, procedures and facilities traditionally offered by hospitals.

Similarly, in Minnesota,⁵⁷ the legislature's pronounced purpose behind the enactment of the "Antitrust Exceptions" statute was to substitute regulation for competition when the proposed arrangement is likely to result in greater access or quality than would otherwise occur in the current competitive market. This statute was repealed in 1993.

In Ohio,⁵⁸ recent legislation allows hospitals to conduct negotiations involving the allocation of health care services or equipment to the extent that such negotiations do not involve price-fixing or predatory pricing, and are designed to achieve one of the following goals: the reduction of health care costs, improvement of access to health services, or the improvement of the quality of patient care.

In Washington,⁵⁹ legislation was enacted to specifically enhance rural health development. The legislature pronounced that the primary goal of state health policy was on the maintenance of the health care service delivery in rural areas. The intent of the statute is to foster the development of cooperative and collaborative arrangements among the rural public hospital districts. The legislature further determined that it is not cost-effective, practical nor desirable to provide quality health care services on a competitive level in rural areas because of the limited patient volume and geographic isolation.

In Wisconsin,⁶⁰ the Health Care Cooperatives Agreement statute is less limiting than others, as it allows health care providers, not just hospitals, to negotiate and voluntarily enter into cooperative agreements. The law defines cooperative agreements as the sharing, allocation or referral of patients, or the sharing or allocation of personnel, services and medical, diagnostic or laboratory facilities or procedures or other services customarily provided by health care providers.

III. DEVELOPMENTAL EFFORTS IN INDIANA RELATING TO MODIFICATION OF FEDERAL ANTITRUST LAW

A. *Indiana Commission on State Health Policy*

In 1989, the Indiana General Assembly created the Indiana Commission on State Health Policy,⁶¹ which was directed to study Indiana health policy and make

57. MINN. STAT. § 62J.29 (1992).

58. OHIO REV. CODE ANN. § 3727.22 (Baldwin 1995).

59. WASH. REV. CODE §§ 39.34.010-.920 (1995).

60. WIS. STAT. §§ 150.84-.86 (1995).

recommendations in order to improve the effectiveness of Indiana's health care delivery system. The Commission issued a report entitled *Hoosier Health Reform*, which summarized the findings of the Commission.⁶²

Among the findings were many references to the much-needed removal of federal antitrust barriers that prevent Indiana health reform from progressing. The Commission recommended that the federal government create an exemption for hospitals engaging in certain collaborative relationships from federal antitrust laws under state supervision. This immunity should be applied to all collaborative activities except those that involve price-fixing, predatory pricing, or group boycotts. The Commission recommended that the exemption not be as stringent as the requirements under the state action immunity doctrine. The Commission concluded that removing federal antitrust barriers would have many benefits.

Merger and collaboration in the hospital industry were found to be in the public's best interest due to tremendous duplication of services and facilities that are costly to the health care system. The Commission referred to a study⁶³ that found that hospitals in more than three-fourths of communities nation-wide would be at risk of violating federal antitrust guidelines if they merged. It also found that a decided trend toward more stringent enforcement of antitrust legislation exists in the health care field, and many collaborative arrangements between providers have the potential to trigger an antitrust challenge under federal guidelines.

Among the benefits the Commission attributed to collaboration between health care providers were that rural hospitals would be able to merge or form networks with larger tertiary hospitals or other rural hospitals in their geographic areas. This would eliminate the duplication of health care technologies and facilities that currently exist and would provide tremendous cost savings. Hospitals would also be able to establish networks and systems to provide a continuum of care for patients, with rural hospitals providing basic acute care, long-term care and ambulatory care, and more specialized needs being provided by larger hospitals belonging to the network. The Commission found ample evidence to show that an increased volume of specialized care available in fewer settings promotes quality of care. Capital markets would be more accessible to smaller hospitals if those providers were linked with larger hospitals, who are financially stronger. The Commission cited the capital needs of smaller hospitals to upgrade facilities and shift missions to provide different types of care such as ambulatory care, long-term care and other less specialized care.

B. Indiana Legislative Action

Governor Evan Bayh addressed the need for removal of federal antitrust barriers to the Indiana community of health care providers in his 1993 State of the State address, *Cornerstones of Progress*. Because of the explosion of medical technology, which has increased the cost of health care, hospitals are competing to have the most up-to-date equipment. Rural hospitals have difficulty competing with larger more urban hospitals in two ways: availability of high-tech medical equipment and ability to attract physicians

61. Ind. Pub. L. 327-1989.

62. INDIANA COMMISSION ON STATE HEALTH POLICY, HOOSIER HEALTH REFORM (Nov. 1992).

63. The name of this study was not cited by the Commission.

willing to accept lower salaries, and longer hours. Affiliation of rural providers with larger hospitals may increase access to capital, promote recruitment of physicians, and lower operating costs. Governor Bayh proposed: (1) eliminating antitrust barriers that prevent effective coordination of services among health providers; (2) establishing criteria and procedures for two or more hospitals to voluntarily request approval for a cooperative or collaborative project; and (3) articulating public policy that encourages collaborative activities to reduce costs, improve access and quality, and reduce duplication.⁶⁴

In the 1993 legislative session, the administration drafted legislation, which, as originally introduced, would have required the ISDH to adopt rules permitting provider collaborative efforts—as permitted under federal antitrust laws—rather than implementing the doctrine of state action immunity.⁶⁵

The Indiana Hospital Association drafted related legislation, H.B. 1800, to create a limited exemption from the federal antitrust laws for various types of collaborative activity among independent hospitals.⁶⁶ H.B. 1800 would have allowed hospitals to enter into collaborative agreements if certain conditions were met to ensure the benefits of provider collaboration outweighed the disadvantages resulting from a reduction in competition. Such collaboration between providers was encouraged under the measure if the agreements materially contributed to cost containment, improved access, reduction in duplicity of services, equipment or facilities, and also promoted efficiency. This legislative attempt to facilitate provider collaboration was not successful, and a similar proposal is likely to be introduced and considered in a future legislative session.⁶⁷

IV. DELIBERATIONS OF THE HOSPITAL ANTITRUST TASK FORCE

A. Fact Finding Activities

1. *Consultation with Indiana Constituencies.*—The Task Force engaged in several efforts to obtain information from affected Indiana constituencies. The major fact-finding activities and the information received are listed below:

- (1) The results of the Indiana Hospital Association Survey of Hospitals on Antitrust Problems Faced by Hospitals in Collaborative Efforts;
- (2) A presentation by Bain Farris, Chief Executive Officer, St. Vincent Hospitals and Health Services, and James Dobson, Esq., General Counsel, Community Hospitals of Indianapolis, on the Collaborative Network between St. Vincent Hospitals and Health Services and Community Hospitals of Indiana;

64. Governor's State of the State Address, *Cornerstones of Progress* (1993).

65. H.B. 1921, 1st Regular Sess., 108th Gen. Assembly (Ind. 1993).

66. H.B. 1800, 1st Reg. Sess., 108th Gen. Assembly (Ind. 1993).

67. In its 1995 session, the General Assembly considered H.B. 1440, which would have authorized hospital collaboration demonstration projects in four Indiana counties if the resulting probable benefits would have outweighed the disadvantages. H.B. 1440, 1st Regular Sess., 109th Gen. Assembly (Ind. 1995). The legislation sought to encourage demonstrations that promoted policy goals such as reduced health care costs, improved access and quality, and greater health system efficiency.

(3) Mr. Farris subsequently sent a letter to the Task Force noting that if a state exemption to federal antitrust laws were more burdensome than the current system of federal review, health care providers would be better served by utilizing the existing federal review process. Similarly, he recommended that any state antitrust exemption be optional, rather than mandatory. He asserted that a state action exemption would be of greatest benefit to smaller regional providers, who currently desire to discuss ways in which they can collaborate to serve the needs of their local community;

(4) Correspondence from Jerry Paine, Secretary/Treasurer, Indiana AFL/CIO, expressing concern about the vertical integration of health care and cautioning about a state antitrust exemption. Mr. Paine adeptly described the inherently conflicting concerns felt by many in labor and industry. Concern exists over expenses caused by duplicity in equipment and services, yet there is equal concern over reducing competition among health care providers;

(5) A presentation by Ron Dyer, Esq., General Counsel, Indiana State Medical Association, regarding physician antitrust concerns. Mr. Dyer subsequently joined the Task Force.

2. *Consultation with Professor James F. Blumstein.*—The Task Force also consulted with James F. Blumstein, Professor, Vanderbilt University School of Law, about the general desirability of state action exemptions to the federal antitrust laws. Professor Blumstein is a prominent scholar in the field of health care antitrust⁶⁸ and has been a strong advocate of free markets and competition in the health care industry.⁶⁹ The Task Force wanted the perspective of such a scholar to help them more fully explore the potential downsides of a state action exemption to the antitrust laws. Professor Blumstein provided the task force a thoughtful presentation on the state action exemption and was most helpful to the Task Force in its deliberations.⁷⁰

3. *Important Findings Reported in National Media.*—On average, sixty-five percent of hospitals nationwide have entered into some type of collaborative arrangement in the

68. His publications include: UNCOMPENSATED HOSPITAL CARE: RIGHTS AND RESPONSIBILITIES (James F. Blumstein et al. eds., 1986); COST, QUALITY AND ACCESS IN HEALTH CARE: NEW ROLES FOR HEALTH PLANNING IN A COMPETITIVE ENVIRONMENT (James F. Blumstein et al. eds., 1988); Symposium, *Antitrust and Health Care*, 51:2 LAW & CONTEMP. PROBS. (1988) (James F. Blumstein & Frank A. Sloan, symposium eds.); ORGAN TRANSPLANTATION POLICY: ISSUES AND PROSPECTS (James F. Blumstein & Frank A. Sloan eds., 1989); REDEFINING GOVERNMENT'S ROLE IN HEALTH CARE: IS A DOSE OF COMPETITION WHAT THE DOCTOR SHOULD ORDER? (James F. Blumstein & Frank A. Sloan eds., 1981) [hereinafter REDEFINING GOVERNMENT'S ROLE].

69. See Symposium, *Antitrust and Health Care*, *supra* note 68; REDEFINING GOVERNMENT'S ROLE, *supra* note 68.

70. Following his consultation with the Task Force, Professor Blumstein wrote a major article on state action immunity under the federal antitrust for collaboration among health care providers. See James F. Blumstein, *Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation*, 79 CORNELL L. REV. 1459 (1994).

last two years.⁷¹ Between 1987 and 1991, more than 229 hospital merged in the United States of which twenty-seven generated federal antitrust investigations resulting in only five antitrust challenges.⁷²

B. Task Force Findings and Conclusions

1. Problematic Collaborative Activities.—The Task Force had difficulty identifying specific types of desirable collaborative activity among hospitals and other health care providers that posed substantial antitrust risks or constrained providers from collaborating because of fear of antitrust exposure. The Task Force was also impressed that many collaborative activities between hospitals and other health care providers are already occurring and are permissible under the antitrust laws.

Specifically, major hospitals in Indianapolis have engaged in a variety of collaborative efforts without finding the antitrust laws such a formidable barrier as to preclude negotiations. For example, St. Vincent Hospital and Health Center and Community Hospitals of Indianapolis established a formal network that functions as much as possible as a single entity without being an actual merger. In this network, revenues exceeding expenses, from each medical center, are combined and allocated according to a formula based on pre-collaborative equity and profit ratios. St. Vincent and Community are currently exploring various clinical and administrative areas for potential consolidation and collaboration.

St. Vincent Hospital and Health Centers and Methodist Hospital of Indiana, Inc. also collaborated in the formation and operation of a rehabilitation hospital that involved, in their judgment, virtually no significant exposure under the antitrust laws. Specifically, the Rehabilitation Hospital of Indiana, Inc. was created as a 50-50 subsidiary of entities controlled by both Methodist and St. Vincent in 1990, because the parties determined that a substantial need for additional rehabilitation beds existed in central Indiana. Without substantial time or expense, the antitrust analysis was performed by Methodist in-house counsel and by local counsel for St. Vincent and a determination was quickly made that federal antitrust review of this new venture to collaboratively own and operate a new \$20 million rehabilitation facility was not required.

Not all proposed mergers of Indiana hospitals have avoided antitrust problems. In the fall of 1990, two 300-plus bed, not-for-profit hospitals in Fort Wayne—St. Joseph Medical Center and Lutheran Hospital of Indiana—announced plans to consolidate in order to reduce their management teams by approximately twenty percent and eventually to consolidate their medical staffs.⁷³ The hospitals declared that the affiliation would reduce duplicative medical equipment, technology, programs and services in Fort Wayne and place the hospitals in a better position to serve indigent patients. Expecting review by the DOJ to be “smooth sailing,” the hospitals cancelled their merger plans one year

71. *Hospital Collaboration Delivers Efficient Care, According to Survey*, PR NEWSWIRE ASSOCIATION, INC., Oct. 25, 1993.

72. See David Marx, Jr., *State Hospital Cooperation Acts: Are They Sufficient Antitrust Shelter for Hospital Collaborations?*, 10:9 HEALTHSPAN 3, Oct. 1993.

73. See David Burda, *Four Hospital Groups Announce Various Form of Merger Deals*, MODERN HEALTHCARE, Oct. 22, 1990.

later in the face of a widening antitrust investigation by the DOJ.⁷⁴ Had the merger taken place it would have given the two hospitals control of fifty-six percent of the private acute-care hospital beds in Fort Wayne, Indiana, which has a population of 173,000.

The Task Force identified three areas of collaboration in which the antitrust laws pose a chilling effect.

- (1) Mergers and/or coordination of services by providers in small towns: The safe harbor provisions of the DOJ/FTC Guidelines, as delineated in *Statements of Antitrust Enforcement Policy in Healthcare*,⁷⁵ do not cover the potential collaboration of two financially healthy and well-utilized hospitals in a smaller community. The DOJ/FTC Guidelines are really restricted to small or failing institutions with low occupancy. Further, the Task Force could not determine whether it would be desirable to promote mergers of multiple hospitals in smaller communities or whether pluralism in the provision of services in these communities might produce added benefits or might promote the operation of two state-wide networks in a community, thereby assuring residents choices among providers and other benefits of competition;
- (2) Consultation between hospitals and other providers about the desirability of collaborative efforts: The Task Force discussed several options that would allow providers to examine whether collaborative activity is in the best public interest, such as a "time out," which is an exempt period from antitrust exposure allowing potential collaborators to discuss the benefits of a proposed collaboration that otherwise constitutes a potential violation of the antitrust laws. For example, providers forming alliances in order to bid to become Indiana Medicaid managed care contractors could well have utilized this protection. However, the Task Force concluded that simply allowing parties to talk under the ostensible sponsorship of a state agency would probably not be sufficient to meet the supervised activity requirements of state action required in the *Ticor* decision. Allowing such protection to providers that are *exploring* collaboration without an extensive state regulatory program currently required for state action exemptions may be an appropriate reform under federal health reform proposals or possibly a DOJ/FTC safe harbor protection. The Clinton health care proposal, The Health Security Act, included such relief in its proposed antitrust reforms;
- (3) Estimating savings of combined clinical departments when two hospitals collaborate in a common network: It is important to recognize that the benefits to a health care provider of clinical combinations or reduction in the duplicity of expensive medical equipment are financial savings. Discussions between providers of savings estimates that would result from collaborations are clearly constrained by both state and federal antitrust laws.

2. *The Required State Regulatory Program for a State Action Exemption.*—As stated in greater depth above, the Supreme Court recently outlined specific requirements to

74. David Burda, *Indiana Hospitals Call Off Merger Following Probe*, MODERN HEALTHCARE, July 1, 1991.

75. See *supra* note 42.

create a state action exemption from the federal antitrust laws. A state must: (1) clearly articulate its public policy to be furthered by the exemption; and (2) actively supervise its review process, which includes allowing the state to review, regulate and deny potential collaborative arrangements.⁷⁶

The Task Force concluded that the legal requirements for a state action exemption, as set out by *Midcal* and clarified by *Ticor*, do not allow Indiana to create the type of antitrust exemption the Task Force could recommend. The Task Force was concerned that the regulatory task would be so great and require such extensive economic and legal expertise that the ISDH or any other state agency, given customary restraints on staff and resources currently experienced by Indiana State agencies, would not be able to conduct the type of regulatory program mandated by the Supreme Court's decisions.

3. *The State's Interest in Promoting a State Action Program.*—The Task Force concluded that the state has an interest in a rational health care system that assures high quality health care services to all citizens at a reasonable cost. The question of how the state would accomplish these goals in a state regulatory program posed a confounding problem in the Task Force's judgment. These goals, the Task Force recognized, were quite similar to the goals of the health planning and Certificate of Need (CON) programs—mandated by Congress in the National Health Planning and Resources Development Act of 1979.⁷⁷ Yet the Task Force unanimously opposed creating a regulatory scheme like the CON program.

The Task Force specifically considered past experiences with health planning and CON in Indiana and the nation. The Task Force noted that federally mandated health planning was not particularly effective in reducing excess capacity or promoting rational development of health care facilities around the state. Further, federal health planning and CON agencies did not effectively administer these programs. Finally, the Task Force agreed, the planning and CON processes simply made disputes between powerful providers over resources and development into political battles that would otherwise be fought through economic competition in a non-regulated market.

4. *Task Force Observations on the Merits of a State Action Exemption.*—Below are listed some of the more important points made by Task Force members that influenced the Task Force's recommendations:

- (1) The Task Force observed that the health care system in Indiana and throughout the United States was in great flux. Hospitals are changing dramatically, particularly in the way that they provide hospital services. Hospitals are joining with physicians and other health care providers to form vertical service delivery networks. National HMOs and other managed care organizations are penetrating Indiana's market for health care services. At the federal level, Congress and the Clinton Administration are considering major legislative proposals for health care reform that would dramatically change the health care system. Given these and other developments, the Task Force was unclear as to the nature of Indiana's future health care delivery system;

76. Federal Trade Comm'n v. Ticor Ins. Co., 504 U.S. 621 (1992).

77. National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (1975).

- (2) Market competition does not necessarily influence hospitals in the same way it influences non-regulated organizations in the business sector. In other words, regulation by the federal government, states and the Joint Commission on Accreditation of Healthcare Organizations imposes requirements on hospitals that preclude hospitals from limiting essential services to communities, and taking other actions that might make them more competitive in a less regulated environment;
- (3) Indiana should not duplicate on the state level the antitrust analysis presently conducted on the federal level. Rather, Indiana should act only if there are clearly identifiable social policy issues on which there is broad consensus, and the achievement of which would be so significant as to justify conduct that might otherwise be considered anti-competitive and/or illegal, and that would also justify the state's establishment of a new review mechanism to determine whether or not such social policies are, in fact, achieved;
- (4) The foremost question in this analysis is whether the market is currently doing, or has the capacity to do, what the public wants regarding quality, cost and efficiency. Only if a significant disparity exists between the status quo and public demands should the government engage in providing additional regulatory systems that enhance the goals of public policy. This question is complicated as there are no guidelines concerning what the public wants in health care. Similarly, the public is unable to assess whether or not the antitrust laws are a benefit or burden to the public interest;
- (5) When H.B. 1800 was introduced in 1993, business was very interested in encouraging provider collaboration in one form or another.⁷⁸ Currently, the business community appears to be more skeptical about the benefits of collaboration that might otherwise be proscribed under the antitrust laws.

V. THE MERITS OF A STATE ACTION EXEMPTION

The Task Force initially posed three questions to answer in its deliberations. The answers to these questions are set forth below.

- (1) Is a state action exemption to the federal antitrust laws a good idea?

The Task Force was reluctant to recommend a change in the economic rules that define how health care providers relate to one another, especially in a changing environment as exists in the health care system presently. The Task Force, however, recognized that future action regarding the antitrust laws may be appropriate and did not "close the door" on the concept of state action immunity for Indiana. The Task Force also concluded that, unless the state could accomplish specific, positive goals for health reform without an extensive state regulatory program of the type clearly contemplated in *Ticor*, the state should not proceed with a state action exemption and associated regulatory program. In other words, the state should not engage in the same type of antitrust review

78. See *supra* note 66.

that the federal government does without seeking to achieve additional positive goals. Adoption of a recommendation for creating a state action exemption should not be made lightly. The state involvement necessary for a state action exemption would require Indiana to dedicate significant resources for continuing oversight of collaborators. While several other states have adopted these statutes, they are untested under the guidelines set out by the *Ticor* decision. If the process of collaborating under the exemption was rigorous, potential collaborators would likely choose traditional review of their proposal by the DOJ and the FTC due to the risk of federal antitrust exposure because of the untested nature of the exemption.

Another reason for the Task Force's decision to refrain from recommending state action immunity legislation at this time is that some experts question whether the state action immunity statutes of other states will actually confer state action immunity when challenged by either the federal government or, more probably, competitors in private antitrust actions.⁷⁹ The Task Force thought it desirable to wait and examine how courts rule on existing state action immunity statutes before proceeding with such a statute in Indiana. Further, it would be desirable to see how state action immunity statutes in other states are used by providers and whether the resulting collaborations are, in fact, beneficial to the health care system.

(2) If so, what activities and persons should be exempted?

The answer to this question is unclear and is one of the major reasons that the Task Force recommends deferring a recommendation for a state action exemption.

(3) If so, what should the state's regulatory program look like?

Clearly, the Task Force is hesitant to recommend a rigorous regulatory program for health care providers of the type contemplated by *Ticor*. The chief concern, which prevented the Task Force from embracing the adoption of a state action exemption, was the extensive state regulation that is required by the Supreme Court in *Ticor*.

In conclusion, the Task Force recommends that Indiana policy-makers consider a state action immunity statute as one of many goals for the health care system, making sure that it coordinates a state action immunity doctrine with other important health-related policy goals. For example, other ways to make health care providers more efficient could include making the state a better purchaser of health care services for the individuals that it insures. The state is already doing this with its Medicaid managed care program. It should consider adopting a similar strategy for other groups for whom it provides or mandates health insurance, e.g., state employees or the beneficiaries of the Indiana Comprehensive Health Insurance Association. Finally, the market for health care services is extremely complex and unique. For some services, e.g., expensive, high technology services for the catastrophically ill, cooperation among providers seems intuitively desirable. However, for other services provided to the general population, competition among providers may be desirable as a way to keep costs down and quality of service high.

79. See *supra* note 70.

POSTSCRIPT

Much has happened in the health care field since the Task Force's deliberations and the writing of this Article.⁸⁰ Congress considered and failed to pass proposals for federally mandated comprehensive health reform, including President Clinton's health reform proposal in the Health Security Act.⁸¹ Yet the health care industry is going through enormous change with unprecedented horizontal and vertical mergers and consolidations of health care providers throughout the United States. These transactions often raise important antitrust issues that are confounding to those involved. This analysis of the state action exemption in Indiana is one state's effort to look at the appropriateness of state action immunity from federal antitrust laws for collaborative activities among hospitals. We hope it is helpful.

80. We have tried to indicate more recent developments in the footnotes of this article.

81. H.R. 3600, 103d Cong., 1st Sess. (1993).



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REPORT

THE INDIANA UNIFORM FRAUDULENT TRANSFER ACT *INTRODUCTION*

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On March 11, 1994, Governor Evan Bayh signed Public Law 144-1994.¹ This act completely revised Indiana fraudulent transfer law, and in so doing repealed laws dating from 1852. The basis for this sweeping change in Indiana commercial law was the Uniform Fraudulent Transfer Act (UFTA), a uniform law first promulgated in 1984 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The reporter for the UFTA was Frank Kennedy, now the Thomas M. Cooley Emeritus Professor of Law at the University of Michigan. As of this writing, thirty-three states have adopted the UFTA in one form or another.²

Indiana's adoption of the UFTA was the product of three years of effort and planning. The Debtor-Creditor Committee of the Indiana State Bar led this effort. In 1991 it formed a committee to study the UFTA, and selected William I. Kohn of the law firm of Barnes & Thornburg as its chair. In 1992 the whole committee approved a report recommending, with slight changes, adoption of the UFTA ("Report"). That Report, in its original form, follows this Introduction.³

The Report was a significant factor in the process that led to the UFTA's enactment in Indiana. Also important in this process were the efforts of Indiana's Uniform Law Commissioners, four of whom deserve special mention: my colleague Kevin Brown, Professor of Law at Indiana University School of Law—Bloomington; Wayne Kreuscher of Barnes & Thornburg (who has now resigned as a commissioner); State Senator Vi

* Professor of Law and Louis F. Niezer Faculty Fellow, Indiana University School of Law—Bloomington. Professor Markell served as the Reporter for the Debtor-Creditor Committee of the Indiana State Bar, and prepared the Report that follows this introduction.

Indiana's enactment of the Uniform Fraudulent Transfer Act would not have been possible without the wise counsel and guidance of William I. Kohn and Gerald L. Bepko, two individuals whose selfless devotion to public service has made Indiana a better state.

1. 1994 Ind. Acts. 144. The bill that became Public Law 144 was introduced on January 6, 1994 as House Bill 1169, 108th General Assembly, 2d Sess. (1994). During the closing days of the legislature, the bill was amended and the text placed in another bill, House Bill 1159. Both houses of the Indiana General Assembly approved the final bill on March 4, 1994.

2. 7A UNIF. LAWS ANN. 188 (Supp. 1995). The Act is pending in four more states: Alaska, 1995 Alaska H.B. No. 72, 19th Legislature, 1st Sess. (1995); Kansas, Kan. H.B. No. 2503, 76th Legislature, 1st Reg. Sess. (1995); Massachusetts, Mass. H.B. No. 281, 179th General Court, 1st Annual Sess. (1995); and North Carolina, N.C. H.B. No. 842, 1995 Reg. Sess.

3. I have placed a hypertext version of the Report on the World Wide Web. Its address, or Universal Resource Locator (URL) is: <http://www.law.indiana.edu/codes/in/indufta.html>.

Simpson, who took Mr. Krueuscher's position and serves in the Indiana General Assembly;⁴ and Gerald L. Bepko, Professor of Law at the Indiana University School of Law—Indianapolis and who also served on the national drafting committee for the UFTA.⁵

The intent of the Report was to provide guidance not only on the existing state of Indiana fraudulent transfer law, but also on the changes the UFTA would bring. In doing so it incorporated, in great detail, the original comments to the UFTA as drafted and adopted by NCCUSL.⁶ The Report also highlighted variations from the text of the UFTA recommended by the Debtor-Creditor Committee. The main value of the Report now lies in the guidance it can give to practitioners who now must apply the UFTA to Indiana transactions.

In addition to this original text, the version printed here includes annotations that reflect the bill as enacted, and changes in the law generally since the Report's adoption. I have, for example, noted when a statute referred to was repealed, and have tried to indicate where a section referred to in the Report was ultimately codified.

To allow the reader to determine the original text, all new material is surrounded by square brackets. Thus, where the Report stated, for example, "Section 4 does this . . ." the version that follows will appear as follows: "Section 4 [IND. CODE §32-2-7-4] does this . . ." The original Report also had numbered footnotes, and these are retained. New footnotes to update or explain the material have been added and are represented by daggers (†).

The Indiana General Assembly also declined to adopt some changes suggested by the Committee. The unadopted suggestions are introduced by material in brackets, and sections of the Report that related solely to unadopted suggestions are noted in italics.

With the adoption of the UFTA, Indiana moved into the mainstream of American debtor-creditor law. Its speedy and efficient adoption is as an example of the salutary results of a public partnership of practicing lawyers, academics and state legislators.

4. Senator Simpson became a Uniform Law Commissioner after enactment of the UFTA. In her capacity as state senator, however, she was instrumental in explaining its provisions to the General Assembly.

5. Professor Bepko is also Vice President of Indiana University and Chancellor of Indiana University-Purdue University at Indianapolis. Professor Bepko has often lent his skills to support commercial law revisions to the Indiana Code.

6. The NCCUSL and West Publishing have granted permission to the *Indiana Law Review* to reprint portions of the comments to the UNIFORM FRAUDULENT TRANSFER ACT.

**REPORT OF THE DEBTOR—CREDITOR COMMITTEE
OF THE
INDIANA STATE BAR ASSOCIATION
REPORTING ON AND RECOMMENDING ADOPTION OF THE
INDIANA UNIFORM FRAUDULENT TRANSFER ACT***

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I. INTRODUCTION

This Report presents the recommendations of the Debtor-Creditor Committee of the Indiana State Bar Association (“Committee”) with respect to adoption of the Uniform Fraudulent Transfer Act (“Uniform Act” or UFTA).¹ As described in more detail below, the Committee recommends adoption of the Uniform Act in Indiana with few changes.

This Report first briefly surveys existing Indiana statutory and case law regarding fraudulent conveyances. As an introduction to the Indiana Act, it next examines the structure and purposes of the Uniform Act. It concludes with a section by section review of the proposed Indiana Act, and with a review of suggested changes to other laws. This commentary highlights some of the major changes in Indiana law that the UFTA would effect, as well as the proposed modifications to the Uniform Act before adoption in Indiana.

1. The National Conference of Commissioners of Uniform Laws adopted the UFTA in 1984, and the American Bar Association approved it in 1985. Since its promulgation in 1985, several law review articles have examined the UFTA. See Peter A. Alces & William E. Dorr, *A Critical Analysis of the New Uniform Fraudulent Transfer Act*, 1985 U. ILL. L. REV. 527; Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195 (1986); Paul M. Shupack, *Confusion and Policy and Language in the Uniform Fraudulent Transfer Act*, 9 CARDZOZ L. REV. 811 (1987); Louis J. Vener, *Transfers and Frauds of Creditors Under the Uniform Acts and the Bankruptcy Code*, 92 COMM. L.J. 218 (1987). Since then, at least 27 states have adopted the UFTA, including Ohio, OHIO REV. CODE ANN. §§ 1336.01 to 1336.11 (1993), and Illinois, ILL. ANN. STAT. ch. 740 , paras. 160/1-160/12 (Smith-Hurd 1993). Michigan was one of the first states to adopt the UFCA, MICH. COMP. LAWS ANN. §§ 566.11 to 566.23 (West 1967), and a bill is currently pending in the Michigan legislature to adopt the UFTA. Mich. H.B. 5317, 86th Legislature, 1991 Regular Session (Introduced Nov. 6, 1991). [Michigan has not yet adopted the UFTA.]

II. OVERVIEW OF CURRENT INDIANA LAW

A. Existing Statutory Law

Indiana traces its fraudulent conveyance law to the English Statute of 13 Elizabeth, enacted in 1571. 13 Eliz., ch. 5 (1571), *repealed by* The Law of Property Act, 15 Geo. 5, ch. 20, § 172 (1925). That statute made it unlawful to convey property with the intent to “hinder, delay or defraud creditors and others of their just and lawful actions.” *Id.* § 1.

In Indiana, fraudulent conveyances are dealt with primarily by Indiana Code section 32-2-1-14. Enacted in 1852 [and repealed when the UFTA was enacted], that statute provides:

All conveyances or assignments, in writing or otherwise, of any estate in lands, or of goods or things in action, every charge upon lands, goods or things in action, and all bonds, contracts, evidences of debt, judgments, decrees, made or suffered with the intent to hinder, delay or defraud creditors or other persons of their lawful damages, forfeitures, debts or demands, shall be void as to the persons sought to be defrauded.

Indiana Code section 34-1-45-1 complements this basic section by making real estate that has been fraudulently conveyed subject to attachment and execution to satisfy judgments against the transferor. [The UFTA modified section 34-1-45-1 to delete the reference to real estate.]

Additional restrictions are found in the “resulting trust” provisions of Indiana Code sections 30-1-9-6 to -8, which provide that when a conveyance for valuable consideration is made to one person, but the consideration paid by another, the conveyance is presumed to be fraudulent as against the creditors of the person paying the consideration. This presumption, if not rebutted, gives rise to a trust in favor of such creditors, including those pre-transfer and, if sufficient evidence of fraudulent intent exists, post-transfer creditors. IND. CODE § 30-1-9-7 [repealed by UFTA]. The presumption may be overcome by demonstrating that the debtor, at the time of the transfer, had sufficient additional property to satisfy his debts. *Eiler v. Crull*, 14 N.E. 79 (Ind. 1897).

Other statutes augment the fraudulent transfer provisions by defining terms such as “creditor.”² Indiana Code section 32-2-1-8 [repealed by UFTA] construes “creditor” to include all persons who are creditors of the vendor or assignor at any time while the transferred goods were in that vendor’s or assignor’s possession or control (as contrasted to post-transfer creditors, who are expressly protected under the UFTA). *But see Gable v. Columbus Cigar Co.*, 38 N.E. 474 (Ind. 1894) (conveyance can be set aside at request of *subsequent* creditors of grantor, where it is shown that the conveyance was *intended* to defraud subsequent as well as existing creditors); *Petree v. Brotherton*, 32 N.E. 300 (Ind. 1892) (same).

2. In addition, statutory provisions relating to redemptions and dividends under the Indiana Business Corporation Law supplement fraudulent transfer law by defining when such transfers or distributions may be made. *See, e.g.*, IND. CODE §§ 23-1-28-1 to -6 (1993) (dealing with permissible distributions in respect of stock ownership).

Indiana Code section 32-2-1-18 [repealed by UFTA] provides that fraudulent intent is a question of fact.³ This statute additionally clarifies that a transaction may not be deemed fraudulent as against creditors or purchasers solely on the ground that it was not founded on valuable consideration; the element of fraudulent intent must additionally have been present. *See Hosanna v. Odishoo*, 193 N.E. 599 (Ind. 1935). Intent may be inferred from attendant facts and circumstances. *Vermillion v. First Nat'l Bank of Greencastle*, 105 N.E. 530 (Ind. App. 1914). The burden of proving fraud is on the party alleging it. *A.D. Baker Co. v. Berry*, 141 N.E. 623 (Ind. App. 1923).

Innocent purchasers for value are given limited protection under Indiana Code section 32-2-1- 17 [repealed by UFTA], *unless* they had prior notice of their immediate grantor's or assignor's fraudulent intent, or of the fraud that rendered such grantor's or assignor's title void. The determinative fact is whether the grantee had notice of the fraud of his immediate grantor or transferor. *Jameson v. Dilley*, 61 N.E. 601 (Ind. App. 1901). If the grantee had notice, a fraudulent transfer may be set aside entirely, even though the grantee paid full consideration. *See Milburn v. Phillips*, 34 N.E. 983; 36 N.E. 360 (Ind. 1894); *Harrison v. Jaquess*, 29 Ind. 208 (1867); *Bray v. Hussey*, 24 Ind. 228 (1865). Cf. *Seager v. Aughe*, 97 Ind. 285 (1884) (setting aside conveyance only to extent of unpaid purchase price where grantee knew of fraud); *Rhodes v. Green*, 36 Ind. 7 (1871) (same). As set forth in Indiana Code section 32-2-1-10 [repealed by UFTA], a grantee with *notice* of the fraud of its immediate transferor or grantor holds property or its proceeds (if the grantee has disposed of the property) in trust for creditors. *See Doherty v. Holiday*, 32 N.E. 315 (Ind. 1892).

Finally, Indiana Code section 35-43-5-4(8) (1993) states that the concealment, encumbrance or transfer of property with the intent to defraud a creditor is criminal fraud. If successfully prosecuted, criminal fraud is a Class D felony, punishable by a jail term of six months to three years, and by a fine of up to \$10,000. If the transfer is done "knowingly and fraudulently" in connection with a federal bankruptcy case, the action may be prosecuted as a federal bankruptcy crime. 18 U.S.C. § 152 (1988). Jail terms of up to one year and fines of up to \$5000 can be imposed. *Id.*

B. Existing Judicial Decisions and Their Effect

As set forth above, Indiana statutes require a finding that fraud existed in connection with a transaction challenged as a fraudulent transfer. However, it is a rare case in which the transferor readily admits the existence of fraudulent intent, and the courts therefore have enhanced the statutory scheme by recognizing that the intent to defraud creditors may be inferred from the facts and circumstances of a particular case. Numerous decisions exist dealing with or enunciating various "badges of fraud" which, when present in sufficient number, will support the inference of fraudulent intent. *See, e.g.*, *Eyler v. C.I.R.*, 760 F.2d 1129 (11th Cir. 1985) (interpreting Indiana law); *Nader v. C.I.R.*, 323 F.2d 139 (7th Cir. 1963); *In re Delagrange*, 65 B.R. 97 (Bankr. N.D. Ind. 1986); *Milburn v. Phillips*, 34 N.E. 983; 36 N.E. 360 (Ind. 1894); *LaPorte Prod. Credit Ass'n v. Kalwitz*, 567 N.E.2d 1202 (Ind. Ct. App. 1991); *Jackson v. Farmers State Bank*, 481 N.E.2d 395

3. "The question of fraudulent intent, in all cases arising under this act, shall be deemed a question of fact . . ." IND. CODE § 32-2-1-18 [repealed by UFTA]. *See also LaPorte Prod. Credit Ass'n v. Kalwitz*, 567 N.E.2d 1202 (Ind. App. 1991).

(Ind. Ct. App. 1985); Arnold v. Dirrim, 398 N.E.2d 442 (Ind. App. 1979). Examples of badges of fraud from which a court may infer intent to defraud include the following:

- (a) A transfer not in the ordinary course of the debtor's affairs;
- (b) The existence of significant indebtedness in comparison to assets;
- (c) The threat, expectation or existence of litigation;
- (d) Receipt of less than fair value for the transfer;
- (e) Secrecy or "deviousness" of the transaction;
- (f) Retention by the transferor of significant rights or privileges with respect to the transferred property;
- (g) Transfer to family members or close friends;
- (h) Evidence of a hurried set of contemporaneous transfers; or
- (i) Retaining assets of highly questionable value.

Milburn, 34 N.E. at 985, quoting O. BUMP, A TREATISE UPON CONVEYANCES MADE BY DEBTORS TO DEFRAUD CREDITORS (3d ed. 1890); *Jackson*, 481 N.E.2d 395. Courts have also considered post-transfer insolvency as a major factor. *Deming Hotel Co. v. Sisson*, 24 N.E.2d 912, 915 (Ind. 1940). Generally, courts require a combination of the foregoing badges of fraud—including insolvency—for a basis of inference of the requisite fraudulent intent. *Id.*; *Jackson*, 481 N.E.2d 395 (holding insolvency merely one badge of fraud, although the strongest badge of fraud; setting aside transaction as fraudulent despite fact that it did not result in debtor's insolvency). It should be noted that the mere presence of badges of fraud does not fatally mark the transaction as fraudulent; it merely establishes a rebuttable presumption of fraudulent intent that can be overcome if the debtor otherwise justifies or defends the transaction. *Jones v. Central Nat'l Bank of St. Johns*, 547 N.E.2d 887 (Ind. Ct. App. 1989).

As the foregoing discussion suggests, a creditor challenging a transaction as fraudulent in Indiana has, historically at least, been required to show that:

- (1) The transaction was *intended* to delay, defraud or hinder creditors;
- (2) The transactions occurred while debtor was insolvent or rendered him insolvent; and
- (3) At the time the creditor attempted to execute on the debt or obligation, the debtor remained insolvent.

Deming Hotel Co., 24 N.E.2d at 915.

This summary was cast into doubt by *Jackson*, which held that insolvency is not an essential prerequisite to the existence of a fraudulent transfer. *Jackson*, 481 N.E.2d at 404-05 (stating that insolvency is merely one badge of fraud, although the strongest badge of fraud; setting aside transaction as fraudulent despite fact that it did not result in debtor's insolvency). Prior to *Jackson*, Indiana decisions holding that transactions were characterized by fraud nearly always involved situations in which the debtor was insolvent at the time of the transfer, or was rendered insolvent as the result of the transfer in question. See, e.g., *Deming Hotel Co.*, 24 N.E.2d at 915. No doubt this logically flows from the fact that creditors typically will not mount a challenge to a transfer if, despite the transfer, the transferor/debtor has sufficient assets to satisfy obligations.

Despite the historic importance of insolvency in Indiana as part of fraudulent transfer law, the term "insolvency" for purposes of fraudulent transfers is not statutorily defined in Indiana. Cf. IND. CODE § 23-1-28-3 (1993) (adopting both balance sheet and equitable

insolvency standards in context of permissible corporate distributions); IND. CODE § 26-1-1-201(23) (1993) (adopting equitable standard of insolvency for transactions subject to the Indiana UCC). The Bankruptcy Code, as discussed below, defines insolvency by reference to the “balance sheet” test, under which the debtor is insolvent if its liabilities exceed assets at a fair valuation. 11 U.S.C. § 101(32) (1988). Several Indiana decisions have apparently utilized this standard. *See, e.g., Deming Hotel Co.*, 24 N.E.2d at 915; *Pennington v. Flock*, 93 Ind. 378, 381 (1883). However, Indiana courts may occasionally have utilized the “equitable insolvency” standard, under which an individual or entity is deemed insolvent if unable to pay obligations as they become due in the ordinary course of the debtor’s business or affairs. *See Schmelling v. Esch*, 147 N.E. 734, 735 (Ind. App. 1925). *See also Jackson*, 481 N.E.2d at 403 n.7 (discussing possible shift from balance sheet standard to equitable standard). A creditor seeking to avoid an allegedly fraudulent transfer typically has been required to demonstrate that the debtor’s insolvency (a) continues to exist at the date the creditor attempted to execute on its claim, *Sell v. Bailey*, 21 N.E. 338 (Ind. 1889), and (b) continues to exist at the time the cause of action to avoid a fraudulent transfer was commenced. *Deming Hotel Co.*, 24 N.E.2d at 915.

III. THE PROPOSAL FOR A NEW ACT

A. General Reasons For Change

Indiana’s statutory law has not changed substantively since its enactment in 1852. During that time, the Uniform Fraudulent Conveyance Act (“UFCA”) was promulgated by the Conference of Commissioners on Uniform State Laws (“Conference”) in 1918. The UFCA was adopted in twenty-five jurisdictions, including the Virgin Islands. It was also adopted in the sections of the Bankruptcy Act of 1938.

The 1918 UFCA was a codification of the “better” decisions applying the Statute of 13 Elizabeth. *See National Bankruptcy Conference, Analysis of H.R. 12889*, 74th Cong., 2d Sess. 213 (Comm. Print 1936). The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on the evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to avoid a transfer as fraudulent. *See American Surety Co. v. Conner*, 166 N.E. 783 (N.Y. 1929) (Cardozo, C.J.).

Indiana did not adopt the UFCA. Partially as a result, recent Indiana decisions have put in doubt the role of insolvency in finding a fraudulent transfer. *Compare Deming Hotel Co.*, 24 N.E.2d at 915 (finding insolvency essential to successful fraudulent conveyance actions) with *Jackson*, 481 N.E.2d at 405 (finding insolvency merely one badge of fraud, although the strongest badge of fraud; setting aside transaction as fraudulent despite fact that it did not result in debtor’s insolvency). Other uncertainties make it perilous for Indiana attorneys to counsel clients on the possible effect of such commonplace transactions as foreclosures and leveraged buyouts. *See Bundles v. Baker*,

856 F.2d 815 (7th Cir. 1988) (holding that provisions of fraudulent transfer provision of Bankruptcy Code require examination of all facts and circumstances surrounding foreclosure). *Compare* Parke County Coal Co. v. Terre Haute Paper Co., 26 N.E. 884 (Ind. 1891) (holding that transaction structured as what would today be called a leveraged buyout could not be attacked by creditors with knowledge of the facts of the transactions) *with* Crowthers McCall Pattern, Inc. v. Lewis., 129 Bankr. 992 (S.D.N.Y. 1991) (holding that creditors with knowledge of a leveraged buyout could, under New York fraudulent transfer statute, challenge leveraged buyout) *and* Aluminum Mills Corp. v. Citicorp North America, Inc., 132 B.R. 869 (Bankr. N.D. Ill. 1991) (finding the same result under Illinois law).

To date, twenty-seven states have adopted the UFTA, making it more widely accepted than the original 1918 UFCA. Although for the most part the UFTA has been adopted without substantial modifications, several states have made modifications that the Committee believes are sensible. It is to a survey of the UFTA, and the Committee's proposed modifications, that this Report now turns.

B. General Overview of the Uniform Act

1. General Comments and Coverage.—The Conference named the Uniform Act the Uniform Fraudulent Transfer Act in recognition of its applicability to transfers of personal property as well as real property, "conveyance" having a connotation restricting it to a transfer of real property. As noted in comment (2) accompanying section 1(1) and comment (8) accompanying section 4, however, the UFTA does not purport to cover the whole law of voidable transfers and obligations. The limited scope of the original UFCA did not impair its effectiveness in achieving uniformity in the areas covered. *See* James A. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 405 (1933).

2. Basic Structure.—The UFTA preserves the basic structure and approach of the UFCA. Two sections in the UFTA delineate which transfers and obligations are fraudulent. Section 4 [IND. CODE § 32-2-7-14] is an adaptation of three sections of the UFCA; section 5 [IND. CODE § 32-2-7-15] is an adaptation of another section of the UFCA. The new placement of these sections highlights standing issues. Both present and future creditors of the transferor can bring actions under section 4 [IND. CODE § 32-2-7-14]; only creditors of the transferor at the time of the transfer can bring actions under section 5 [IND. CODE § 32-2-7-15].

The UFTA carries forward the wording from the Statute of Elizabeth and current Indiana law by declaring a transfer made or an obligation incurred with actual intent to hinder, delay, or defraud creditors to be fraudulent. In addition, however, the UFTA clarifies the role of insolvency and the role of badges of fraud by rendering a transfer made or obligation incurred without adequate consideration to be constructively fraudulent—*i.e.*, without regard to the actual intent of the parties—under one of the following conditions: (1) the debtor was left by the transfer or obligation with unreasonably small assets for a transaction or the business in which he was engaged; (2) the debtor intended to incur, or believed that he would incur, more debts than he would be able to pay; or (3) the debtor was insolvent at the time or as a result of the transfer or obligation.

A transfer or obligation that is constructively fraudulent because insolvency concurs with or follows failure to receive adequate consideration is voidable only by a creditor in

existence at the time the transfer occurs or the obligation is incurred. Either an existing or subsequent creditor may avoid a transfer or obligation for inadequate consideration when accompanied by the financial condition specified in section 4(b)(1) [IND. CODE § 32-2-7-14(2)] or the mental state specified in section 4(b)(2) [IND. CODE § 32-2-7-14(1)].

3. *Reasonably Equivalent Value.*—As noted above, reasonably equivalent value is required in order to constitute adequate consideration under the UFTA. The provisions of the UFTA follow the Bankruptcy Code in eliminating good faith on the part of the transferee or obligee as an issue in the determination of whether adequate consideration is given by a transferee or obligee. The UFTA, like the Bankruptcy Code, allows the transferee or obligee to show good faith as a defense after a creditor establishes that a fraudulent transfer has been made or a fraudulent obligation has been incurred. Thus a showing by a defendant that a reasonable equivalent has been given in good faith for a transfer or obligation is a complete defense although the debtor is shown to have intended to hinder, delay, or defraud creditors.

A good faith transferee or obligee who has given less than a reasonable equivalent value is nevertheless allowed a reduction in a liability to the extent of the value given. The UFTA, like the Bankruptcy Code, eliminates the provision of the UFCA that enables a creditor to attack a security transfer on the ground that the value of the property transferred is disproportionate to the debt secured. The premise of the UFTA is that the value of the interest transferred for security is measured by and thus corresponds exactly to the debt secured. Foreclosure of a debtor's interest by a regularly conducted, noncollusive sale on default under a mortgage or other security agreement may not be avoided under the UFTA as a transfer for less than a reasonably equivalent value.

4. *Insolvency.*—As noted above, Indiana law currently lacks any definition for insolvency. The UFTA's definition of insolvency is adapted from the definition of the term in the Bankruptcy Code, which adopts a balance sheet test. In addition, because of the procedural context of most fraudulent transfer actions—a frustrated creditor suing a transferee of the debtor—insolvency is presumed from proof of a general failure to pay debts as they become due.

5. *Remedies.*—Section 7 of the UFTA [IND. CODE § 32-2-7-17] lists the remedies available to creditors under the Uniform Act. It eliminates as unnecessary and confusing the UFCA's distinction between remedies available to holders of matured claims and those holding unmatured claims. Since promulgation of the UFCA in 1918, the United States Supreme Court has imposed restrictions on the availability and use of prejudgment remedies. As a result many states have amended their statutes and rules applicable to such remedies, and it is frequently unclear whether a state's procedures include a prejudgment remedy against a fraudulent transfer or obligation.

6. *Defenses.*—Section 8 of the UFTA [IND. CODE § 32-2-7-18] prescribes the measure of liability of a transferee or obligee and enumerates defenses. Liability is limited to the amount of the property or obligation received. Moreover, a transferee of a transfer made with actual intent to hinder, delay or defraud has a complete defense to the extent she gave value in good faith. The transferee of a transfer or obligation that is constructively fraudulent has a lien on the property or may enforce the obligation to the extent of actual value given. Finally, Section 8 [IND. CODE § 32-2-7-18] precludes avoidance, as a constructively fraudulent transfer, of the termination of a lease on default or the enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

7. *Timing of Transfers and Statutes of Limitations.*—Section 6 of the UFTA [IND. CODE § 32-2-7-16] is new. It specifies when a transfer is made or an obligation is incurred. The section specifying the time when a transfer occurs is adapted from section 548(d) of the Bankruptcy Code. Its premise is that if the law prescribes a mode for making the transfer a matter of public record or notice, it is not deemed to be made for any purpose under the Uniform Act until it has become such a matter of record or notice.

The Uniform Act also includes a statute of limitations that bars the right rather than the remedy on expiration of the statutory periods prescribed. The law governing limitations on actions to avoid fraudulent transfers among the states is unclear and full of diversity. The UFTA recognizes that laches and estoppel may operate to preclude a particular creditor from pursuing a remedy against a fraudulent transfer or obligation even though the statutory period of limitations has not run.

C. *The Uniform Act in Indiana—Suggested Modifications*

The Committee believes that the enactment of the UFTA would be a great advance in Indiana commercial law. It also believes, however, that certain of the provisions of the Uniform Act require modification before enactment in Indiana. These changes are outlined below, and a more detailed explanation of their effect is to be found in the commentary to the section affected.

1. *Badges of Fraud.*—Section 4(b) of the UFTA sets forth a nonexclusive list of factors that may be appropriate for consideration by a court in determining whether the debtor had an actual intent to hinder, delay or defraud one or more creditors within the meaning of section 4(a). Historically, courts construing Indiana law have referred to such factors as “badges of fraud.” *See* Eyler v. C.I.R., 760 F.2d 1129 (11th Cir. 1985) (interpreting Indiana law); Nader v. C.I.R., 323 F.2d 139 (7th Cir. 1963); *In re Delagrange*, 65 B.R. 97 (Bankr. N.D. Ind. 1986); Milburn v. Phillips, 34 N.E. 983; 36 N.E. 360 (Ind. 1894); LaPorte Prod. Credit Ass’n v. Kalwitz, 567 N.E.2d 1202 (Ind. Ct. App. 1991); Jackson v. Farmers State Bank, 481 N.E.2d 395, 395 (Ind. Ct. App. 1985); Arnold v. Dirrim, 398 N.E.2d 442 (Ind. App. 1979).

The badges of fraud listed in section 4(b) of the UFTA are also set forth and elaborated upon in the Uniform Comments. The UFTA and the Uniform Comments make it clear that the existence of any one or more of the badges of fraud listed in section 4(b) of UFTA may merely be relevant evidence as to the debtor’s actual intent, and does not create any presumption or otherwise have any legal effect.

Accordingly, the Committee views those factors as being more appropriately addressed solely in the comments, and has removed them from the statute. Listing of those factors in the statute may cause inappropriate significance to be given to the existence or nonexistence of one or more of the listed factors in a particular case, notwithstanding the clear statements in the text and comments of the UFTA to the contrary. Cf. Frank R. Kennedy, *The Uniform Fraudulent Transfer Act*, 18 U.C.C. L.J. 195, 201 (1986). The Committee does not view this as a change in the meaning of the UFTA.

2. *Decision Not to Make Insider Preferences Fraudulent Transfers.*—The UFTA creates a new category of fraudulent transfer that has no parallel in the UFCA nor in prior Indiana law: a transfer on account of an antecedent debt by an insolvent debtor to an insider who has reasonable cause to believe the debtor to be insolvent is deemed to be a fraudulent transfer under section 5(b) of the UFTA. The transactions that are the subject

of section 5(b) of the UFTA are not fraudulent transfers as historically understood, however, but rather preferences. Under current Indiana law, a non-fraudulent satisfaction of any debt in good faith—including satisfaction of a debt payable to an insider such as an officer of a corporation—is permitted without regard to its preferential effect. *Nappanee Canning Co. v. Reid, Murdock & Co.*, 64 N.E. 870 (Ind. 1902); *Jordan v. Lynch Land Co.*, 147 N.E. 318 (Ind. App. 1925); *Abe v. Summerville*, 92 N.E. 658 (Ind. App. 1916). *See also Vale v. Gary Nat'l Bank*, 406 F.2d 39 (7th Cir. 1969) (holding that debtor may assign less than all of its property for the benefit of less than all of its creditors). In short, adoption of section 5(b) would convert a transfer previously permissible under Indiana law into a transfer labelled fraudulent and hence illegal.

The Indiana Act omits this new category of fraudulent transfer. At least two other states that have adopted the UFTA, Arizona and California, have done likewise. ARIZ. REV. STAT. § 44-1005; CAL. CIV. CODE § 3439.05. A third, Pennsylvania, is considering its omission.[†]

The Committee believes that it is inappropriate to expand the fraudulent transfer laws to include preferential transfers. As with other rights under fraudulent transfer laws, the rights created by section 5(b) of the UFTA would be difficult or impossible, as a practical matter, to adjust by contract, no matter how large a majority of creditors might be willing to agree to such adjustment. It thus would adversely affect the ability of a debtor and its creditors to achieve an effective composition agreement in those cases in which the vast majority of interested parties would prefer to avoid a bankruptcy. By contrast, omission of section 5(b) does not raise a practical bar to contractual adjustment, at least for voluntary creditors, because they may (and frequently do) obtain much the same rights as are created by section 5(b) through debt subordination agreements.

Furthermore, under both existing law and the UFTA, avoidance of a transfer is not for the benefit of the debtor's creditors generally, but only for the benefit of the plaintiff creditor. Hence section 5(b) merely shifts the benefit of the preference from the insider creditor to the plaintiff creditor. The Committee believes that preferential transfers are properly dealt with under state law, if at all, only as an adjunct to a comprehensive state insolvency law providing a mechanism for the recovery of such transfers for the benefit of all creditors. Cf. IND. CODE § 32-12-1-1 (1993) (providing for statutory assignment for the benefit of creditors that preserves the right of potential assignees to preferences except in limited circumstances); IND. CODE § 27-9-3-14 (1993) (providing for recovery of fraudulent transfer in context of liquidation of insurance companies); IND. CODE § 27-9-3-16 (1993) (providing for recovery of preferences in context of liquidation of insurance companies). In this regard, concepts of equitable subordination and the precepts of corporate law affecting dividends would seem to adequately address any issues raised by such insider transfers. If anything is to be left to state fraudulent transfer law, the Committee believes that proposed section 4(a) [IND. CODE § 32-2-7-14(2)] provides adequate coverage.

Finally, if the debtor is the subject of a case under the Bankruptcy Code, section 544(b) of the Bankruptcy Code may enable the debtor's trustee to recover for the benefit of the creditors generally any transfers avoidable under section 5(b) of the UFTA. But in any such case the debtor's trustee also would be entitled to invoke section 547 of the

[†] Pennsylvania ultimately did not adopt section 5(6). 12 PA. CONS. STAT. § 5105 (1994).

Bankruptcy Code, which deals comprehensively with preferences and places special burdens on preferences in favor of insiders. In the view of the Committee, no need exists to supplement section 547 with overlapping rights created under state law. In particular, the Committee believes that the primary use of section 5(b) will be in bankruptcy, and as an extension of the preference periods from ninety days to four years. *Cf. Browning Interests v. Allison*, 955 F.2d 1008 (5th Cir. 1992) (setting aside grant of security interest to secured debt to former wife made outside of preference period in bankruptcy under Texas version of section 5(b); holding former wife to be an "insider.").

Accordingly, the Indiana Act omits section 5(b) of the Uniform Act, as well as related definitions and implementing provisions (Uniform Act sections 1(1), 1(7), 1(11), 3(c), 8(f), 9(c)).

[The legislature did not adopt the changes related to this recommendation.]

3. *Modifications to Exemption Laws.*—*The Uniform Act is silent with respect to the status of a transfer made by a debtor to take advantage of state exemption laws. Such transfers raise the following issue: Is the intent to take advantage of state exemption laws an intent to "hinder" or "delay" creditors within the meaning of proposed section 4(a)? The issue is critical to practicing lawyers. If such transfers are avoidable, then lawyers risk counseling a fraudulent transaction, and possibly a crime, by giving advice on available exemptions. If they are not avoidable, then lawyers risk malpractice if they do not advise on the available exemptions. The Federal Bankruptcy Code appears not to categorize such transfers as fraudulent. S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978) ("As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a petition. The practice is not fraudulent as to creditors and permits the debtor to make full use of the exemptions to which he is entitled under the law.").*

To remove this potential dilemma from state law, the Committee has suggested modifying Indiana Code section 34-2-28-1 to state explicitly that such transfers, if made in good faith, are exempt from avoidance under the Indiana Act. This modification will allow lawyers to counsel confidently with respect to a debtor's right, provided for by the Indiana Constitution, to take advantage of reasonable exemptions.

4. *Other Modifications.*—Section 2(b) of the UFTA [IND. CODE § 32-2-7-12(d)] is modified to make explicit the effect of the presumption of insolvency when a debtor is not paying his debts as they become due. Section 7(a)(3)(i) [IND. CODE § 32-2-7-17(a)(3)(A)] is expanded to ensure that a court may enjoin all transfers of proceeds of an asset fraudulently transferred within the meaning of the Indiana Act. Finally, section 10 [IND. CODE § 32-2-7-20] is modified to include the law of equitable subordination in the list of provisions of other state law not preempted by the Indiana Act.

IV. SECTION BY SECTION COMMENTARY OF THE PROPOSED INDIANA ACT

Section 1. Definitions [IND. CODE §§ 32-2-7-2 to 32-2-7-11]

1. The Text.—As used in this Act:

(1) “Asset” [IND. CODE § 32-2-7-2] means property of a debtor, but the term does not include:

- (i) property to the extent it is encumbered by a valid lien;
- (ii) property to the extent it is generally exempt under nonbankruptcy law; or
- (iii) an interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only one tenant.

(2) “Claim” [IND. CODE § 32-2-7-3] means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

(3) “Creditor” [IND. CODE § 32-2-7-4] means a person who has a claim.

(4) “Debt” [IND. CODE § 32-2-7-5] means liability on a claim.

(5) “Debtor” [IND. CODE § 32-2-7-6] means a person who is liable on a claim.

(6) “Lien” [IND. CODE § 32-2-7-7] means a charge against or an interest in property to secure payment of a debt or performance of an obligation, and includes a security interest created by agreement, a judicial lien obtained by legal or equitable process or proceedings, a common-law lien, or a statutory lien.

(7) “Person” [IND. CODE § 32-2-7-8] means an individual, partnership, corporation, association, organization, government or governmental subdivision or agency, business trust, estate, trust, or any other legal or commercial entity.

(8) “Property” [IND. CODE § 32-2-7-9] means anything that may be the subject of ownership.

(9) “Transfer” [IND. CODE § 32-2-7-10] means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance.

(10) “Valid lien” [IND. CODE § 32-2-7-11] means a lien that is effective against the holder of a judicial lien subsequently obtained by legal or equitable process or proceedings.

2. *The Comment.*—(1) [IND. CODE § 32-1-7-1] The definition of “asset” is substantially the same as the definition of “assets” in section 1 of the UFCA. The definition in the Indiana Act, unlike that in the earlier UFCA, does not, however, require a determination that the property is liable for the debts of the debtor. Thus, an unliquidated claim for damages resulting from personal injury or a contingent claim of a surety for reimbursement, contribution, or subrogation may be counted as an asset for the purpose of determining whether the holder of the claim is solvent as a debtor under section 2 of this Act, although applicable law may not allow such an asset to be levied on and sold by a creditor. *Cf. Manufacturers & Traders Trust Co. v. Goldman*, 578 F.2d 904, 907-09 (2d Cir. 1978).

Subparagraphs (i), (ii), and (iii) [IND. CODE § 32-2-7-2(1) to (3)] exclude from the term “asset” not only generally exempt property but property to the extent that it is subject to a valid encumbrance and property held in a tenancy by the entirety. This Act, like its predecessor and the Statute of 13 Elizabeth, declares rights and provides remedies for unsecured creditors against transfers that impede them in the collection of their claims.

The laws protecting valid liens against impairment by levying creditors, exemption statutes, and the rules restricting levyability of interest in entireties property are limitations on the rights and remedies of unsecured creditors, and it is therefore appropriate to exclude property interests that are beyond the reach of unsecured creditors from the definition of "asset" for the purposes of this Act.

A creditor of a joint tenant or tenant in common may ordinarily collect a judgment by process against the tenant's interest, and in some states a creditor of a tenant by the entirety may likewise collect a judgment by process against the tenant's interest. *See 2 AMERICAN LAW OF PROPERTY* 10, 22, 28-32 (1952); William G. Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 258-59 (1974). In Indiana, although property held as a tenancies by the entireties is exempt, IND. CODE § 34-2-28-1(a)(5) (1993), the debtor's interest could be reached if the husband and wife waive any defenses they may have, or if both of them grant a security interest or lien in the property in favor of the creditor. In such cases, the levyable interest of such a tenant is included as an asset under this Act.

Although the definition of "assets" in the UFCA excluded property that is exempt from liability for debts, it did not exclude all property that can not be reached by a creditor through judicial proceedings to collect a debt. Thus, it included the interest of a tenant by the entirety, although in nearly half the states such an interest can not be subjected to liability for a debt unless it is an obligation owned jointly by the debtor with his or her cotenant by the entirety. *See 2 AMERICAN LAW OF PROPERTY* 29 (1952); William G. Craig, *An Analysis of Estates by the Entirety in Bankruptcy*, 48 AM. BANKR. L.J. 255, 258 (1974). The definition in this Act requires exclusion of interests in property held by tenants by the entirety that are not subject to collection process by a creditor without a right to proceed against both tenants by the entirety as joint debtors.

The reference to "generally exempt" property in section 1(2)(ii) [IND. CODE § 32-2-7-2(2)] recognizes that all exemptions are subject to exceptions. Creditors having special rights against generally exempt property typically include claimants for alimony, taxes, wages, the purchase price of the property, and labor or materials that improve the property. *See Uniform Exemptions Act* § 10 and the accompanying comment. The fact that a particular creditor may reach generally exempt property by resorting to judicial process does not warrant its inclusion as an asset in determining whether the debtor is insolvent.

Since this Act is not an exclusive law on the subject of voidable transfers and obligations (see comment (8) to section 4, *infra*), it does not preclude the holder of a claim that may be collected by process against property generally exempt as to other creditors from obtaining relief from a transfer of such property that hinders, delays, or defrauds the holder of such a claim. Likewise the holder of an unsecured claim enforceable against tenants by the entirety is not precluded by this Act from pursuing a remedy against a transfer of property held by the entirety that hinders, delays, or defrauds the holder of such a claim.

Similarly, the holder of a claim secured by a valid lien is not precluded by this chapter from pursuing a remedy against a disposition of the holder's collateral that hinders, delays or defrauds such holder. The extent, if any, to which a common law of fraudulent transfers, derived from the principles underlying the Statute of 13 Elizabeth as historically developed, may be appropriately invoked in such circumstances is left to

judicial development. *Cf.* Comment 2(c) to UCC § 9-306 (IND. CODE § 26-1-9-306 (1993)).

Nonbankruptcy law is state or federal law that is not part of the Bankruptcy Code, Title 11 of the United States Code. The definition of an "asset" thus does not include property that would be subject to administration for the benefit of creditors under the Bankruptcy Code unless it is subject under other applicable law, state or federal, to process for the collection of a creditor's claim against a single debtor.

Property encumbered by a valid lien is excluded from the definition of "asset" only "to the extent" the property is so encumbered. For example, in the case of property encumbered by a lien securing a contingent obligation, such as a guaranty, in general it would be appropriate to value the obligation by discounting its face amount to reflect the probability that the guaranty will ever be called upon. Likewise, if an obligation is secured by a lien on several items of property and only one such item is disposed of, it may be appropriate to allocate the obligation among the items of property subject to the lien for the purpose of determining the "extent" to which the item disposed of is encumbered for purposes of this definition.

(2) [IND. CODE § 32-2-7-3] The definition of "claim" is derived from section 101(5) of the Bankruptcy Code. Since the purpose of this Act is primarily to protect unsecured creditors against transfers and obligations injurious to their rights, the words "claim" and "debt" as used in this Act generally have reference to an unsecured claim and debt. As the context may indicate, however, usage of the terms is not so restricted.

(3) [IND. CODE § 32-2-7-4] The definition of "creditor" in combination with the definition of "claim" has substantially the same effect as the definition of "creditor" under section 1 of the UFCA. As under that Act, the holder of an unliquidated tort claim or a contingent claim may be a creditor protected by this Act. This carries forward prior Indiana law. *Bishop v. Redmond*, 83 Ind. 157 (1882); *Shean v. Shay*, 42 Ind. 375 (1873).

(4) [IND. CODE § 32-2-7-5] The definition of "debt" is derived from section 101(12) of the Bankruptcy Code.

(5) [IND. CODE § 32-2-7-6] The definition of "debtor" is new.

(6) [IND. CODE § 32-2-7-7] The definition of "lien" is derived from paragraphs (36), (37), (51), and (53) of section 101 of the Bankruptcy Code, which define "judicial lien," "lien," "security interest," and "statutory lien" respectively.

(7) [IND. CODE § 32-2-7-8] The definition of "person" is adapted from paragraphs (28) and (30) of section 1-201 of the UCC, defining "organization" and "person" respectively.

(8) [IND. CODE § 32-2-7-9] The definition of "property" is derived from section 1-201(33) of the Uniform Probate Code. Property includes both real and personal property, whether tangible or intangible, and any interest in property, whether legal or equitable.

The definition of "property" is intended to be construed broadly, to include any right or interest that contributes to the value of a person. Hence, for example, "property" in general includes licenses, permits, franchises and contracts, whether or not transferable. In particular, but without limitation, governmental licenses and permits that contribute to the value of the holder in general should be deemed "property" of the holder, whether or not transferable, regardless of whether such items are deemed "property" for other purposes (*e.g.*, regardless of whether such an item may be the subject of execution, or whether such an item is deemed a withdrawable privilege, rather than a property right, as

against the issuing authority). Note, however, that such property may have little or no value in certain circumstances (*e.g.*, such items, if nontransferable, may have no value if the holder is not valued on a going-concern basis). *See* comment (1) to section 2, *infra*.

(9) [IND. CODE § 32-2-7-10] The definition of "transfer" is derived principally from section 101(54) of the Bankruptcy Code. The definition of "conveyance" in section 1 of the UFCA was similarly comprehensive and the references in this Act to "payment of money, release, lease, and the creation of a lien or incumbrance" are derived from the UFCA. While the definition in the UFCA did not explicitly refer to an involuntary transfer, the decisions under that Act were generally consistent with an interpretation that covered such a transfer. *See, e.g.*, Lefkowitz v. Finkelstein Trading Corp., 14 F. Supp. 898, 899 (S.D.N.Y. 1936) (execution sale); Hearn 45 St. Corp. v. Jano, 27 N.E.2d 814 (N.Y. 1940) (execution and foreclosure sales); Langan v. First Trust & Deposit Co., 101 N.Y.S.2d 36 (4th Dept. 1950), *aff'd*, 100 N.E.2d 189 (N.Y. 1951) (mortgage foreclosure); Catabene v. Wallner, 85 A.2d 300, 302 (N.J. Super. 1951) (mortgage foreclosure).

Although derived from the Bankruptcy Code, the proposed definition of transfer does not include language added to the Bankruptcy Code by Public Law No. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984. This omission is not intended to exclude the types of transfers covered by the 1984 amendments to the Code, as that was not the intent of the 1984 amendments.

The scope of "transfer" is intended to be quite broad. It includes, for example, transfer under the UFCA and similar statutes governing the "garden variety" change of title in real estate. It also includes the more exotic: a settlement agreement, *In re Edward Harvey Co.*, 68 B.R. 851, 858 (Bankr. D. Mass. 1987); a change of a beneficiary of a life insurance policy, Schaefer v. Fisher, 242 N.Y.S. 308, 314 (N.Y. 1930); a transaction entered into in connection with a leveraged buyout, *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288 (3d Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *see generally* David Gray Carlson, *Leveraged Buyouts in Bankruptcy*, 20 GA. L. REV. 73 (1985); and payments of dividends, *Consove v. Cohen*, 783 F.2d 978, 982 (1st Cir. 1983); *Mancuso v. Champion*, 119 B.R. 106, 109 (Bankr. N.D. Tex. 1990); *Fox v. MGM Grand Hotels*, 187 Cal. Rptr. 141 (Cal. Ct. App. 1984). The correlative concept of "obligations incurred" includes guaranties, *Lawrence Paperboard Corp. v. Arlington Trust Co.*, 76 B.R. 866, 874-76 (Bankr. D. Mass. 1987), as well as long term contracts for which the debtor received little benefit, *FDIC v. Malin*, 802 F.2d 12, 18 (2d Cir. 1986) (divorce agreement); *Wilson v. Holub*, 210 N.W. 593, 595 (Iowa 1926) (rescission of a profitable contract); *Larrimer v. Feney*, 192 A.2d 351, 353 (Pa. 1963) (payment of usurious interest).

In short, almost every economic transaction entered into by a debtor is capable of being characterized as either a transfer or an obligation incurred. The UFTA provides limitations on who can avoid these transactions, and which transactions can be avoided in both the standing areas and in the defenses to the substantive causes of action.

(10) [IND. CODE § 32-2-7-11] The definition of "valid lien" is new. A valid lien includes an equitable lien that may not be defeated by a judicial lien creditor. *See, e.g.*, *Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 136 (1962) (upholding a surety's equitable lien in respect to a fund owing a bankrupt contractor).

Section 2. Insolvency [IND. CODE § 32-2-7-12]

1. *The Text.*—(a) [IND. CODE § 32-2-7-12(c)] A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.

(b) [IND. CODE § 32-2-7-12(d)] A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent. This presumption, if effective, shall impose upon the party against whom the presumption is directed the burden of proving that the nonexistence of insolvency is more probable than its existence.

(c) [IND. CODE § 32-2-7-12(e)] A partnership is insolvent under subsection (a) if the sum of the partnership's debts is greater than the aggregate, at a fair valuation, of all of the partnership's assets and the sum of the excess of the value of each general partner's nonpartnership assets over each general partner's nonpartnership debts.

(d) [IND. CODE § 32-2-7-12(a)] Assets under this section do not include property that has been transferred, concealed, or removed with intent to hinder, delay, or defraud creditors or that has been transferred in a manner making the transfer voidable under this Act.

(e) [IND. CODE § 32-2-7-12(b)] Debts under this section do not include an obligation to the extent it is secured by a valid lien on property of the debtor not included as an asset.

2. *The Comment.*—(1) Subsection (a) [IND. CODE § 32-2-7-12(d)] is derived from the definition of “insolvent” in section 101(32)(A) of the Bankruptcy Code. The definition in subsection (a) [IND. CODE § 32-2-7-12(d)] and the correlated definition of partnership insolvency in subsection (c) [IND. CODE § 32-2-7-12(e)] contemplate a fair valuation of the debts as well as the assets of the debtor. As under the definition of the same term in section 2 of the UFCA, exempt property is excluded from the computation of the value of the assets. *See* § 1(1), *supra*. For similar reasons interests in valid spendthrift trusts and interests in tenancies by the entireties that cannot be severed by a creditor of only one tenant are not included. *See* the comment to § 1(2), *supra*. Since a valid lien also precludes an unsecured creditor from collecting the creditor’s claim from the encumbered interest in a debtor’s property, both the encumbered interest and the debt secured thereby are excluded from the computation of insolvency under this Act. *See* § 1(1) *supra* and subsection (e) of this section.

As under the Bankruptcy Code, this valuation is *not* a liquidation analysis. The “fair valuation” limitation is almost a modified market price valuation. As stated by Collier with respect to the identical provision in the Bankruptcy Code:

[fair] valuation, in general, will signify the reasonable estimate of what can be realized from the assets by converting them into, or reducing them to cash, under carefully guarded if not idealized conditions.

1 COLLIER ON BANKRUPTCY ¶ 101.29[4] (15th ed. 1991). *See also* Emerald Hills Country Club, Inc. v. Hollywood, Inc., 32 B.R. 408, 420-21 (Bankr. S.D. Fla. 1983); Varon v. Trimble, Marshall & Goldman, P.C., 33 B.R. 872, 885 (Bankr. S.D.N.Y. 1983).

As under the Bankruptcy Code, contingent liabilities are counted at a value discounted by the probability that they will mature, *In re Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir. 1988), even though under the UFCA they were counted at full face value. *Chase Manhattan Bank (N.A.) v. Oppenheim*, 440 N.Y.S.2d 829, 831 (N.Y. Sup. Ct. 1981); *Marine Midland Bank v. Stein*, 433 N.Y.S.2d 325, 327 (N.Y. Sup. Ct. 1980). The same holds true for contingent assets. *See Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635 (3d Cir. 1991) (noting that lower court erred in not counting as an asset the debtor’s rights of contribution against other guarantors of LBO debt).

(2) Section 2(b) [IND. CODE § 32-2-7-12(d)] establishes a rebuttable presumption of insolvency from the fact of general nonpayment of debts as they become due. Such general nonpayment is a ground for the filing of an involuntary petition under section 303(h)(1) of the Bankruptcy Code. *See also* IND. CODE § 26-1-1-201(23) (1993), which declares a person to be "insolvent" who "has ceased to pay his debts in the ordinary course of business." This act elevates language from the official comments to the UFTA to the text of the statute in order to make clear the effect of the presumption; this change is not intended to create any variance from the text of the UFTA, and is made in response to existing academic commentary that suggests that without the elevation, a risk exists for non-uniform interpretation. *See* Paul M. Shupack, *Confusion in Policy and Language in the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 811, 830 n.84 (1987).

The presumption is established in recognition of the difficulties typically imposed on a creditor in proving insolvency in the bankruptcy sense, as provided in subsection (a) [(c)]. *See generally* Louis W. Levit, *The Archaic Concept of Balance-Sheet Insolvency*, 47 AM. BANKR. L.J. 215 (1973). Not only is the relevant information in the possession of a noncooperative debtor but the debtor's records are more often than not incomplete and inaccurate. As a practical matter, insolvency is most cogently evidenced by a general cessation of payment of debts, as has long been recognized by the laws of other countries and is now reflected in the Bankruptcy Code. *See* Jan Honsberger, *Failure to Pay One's Debts Generally as They Become Due: The Experience of France and Canada*, 54 AM. BANKR. L.J. 153 (1980); JAMES A. MACLACHLAN, BANKRUPTCY 13, 63-64, 436 (1956). In determining whether a debtor is paying its debts generally as they become due, the court should look at more than the amount and due dates of the indebtedness. The court should also take into account such factors as the number of the debtor's debts, the proportion of those debts not being paid, the duration of the nonpayment, and the existence of bona fide disputes or other special circumstances alleged to constitute an explanation for the stoppage of payments. The court's determination may be affected by a consideration of the debtor's payment practices prior to the period of alleged nonpayment and the payment practices of the trade or industry in which the debtor is engaged. The case law that has developed under section 303(h)(1) of the Bankruptcy Code has not required a showing that a debtor has failed or refused to pay a majority in number and amount of his or her debts in order to prove general nonpayment of debts as they become due. *See, e.g.*, Hill v. Cargill, Inc., 8 B.R. 779 (Bankr. D. Minn. 1981) (holding nonpayment of three largest debts to constitute general nonpayment, although small debts were being paid); *In re All Media Properties, Inc.*, 5 B.R. 126 (Bankr. S.D. Tex. 1980) (holding that missing significant number of payments or regularly missing payments significant in amount constitutes general nonpayment; missing payments on more than 50 percent of aggregate of claims is not required to show general nonpayment; nonpayment for more than 30 days after billing establishes nonpayment of a debt when it is due); *In re Kreidler Import Corp.*, 4 B.R. 256 (Bankr. D. Md. 1980) (holding that nonpayment of one debt constituting 97 percent of debtor's total indebtedness constitutes general nonpayment). A presumption of insolvency does not arise from nonpayment of a debt as to which there is a genuine bona fide dispute, even though the debt is a substantial part of the debtor's indebtedness. Cf. 11 U.S.C. § 303(h)(1) (1988), as amended by § 426(b) of Pub. L. 98-882, the Bankruptcy Amendments and Federal Judgeship Act of 1984.

(3) Subsection (c) [IND. CODE § 32-2-7-12(e)] is derived from the definition of partnership insolvency in section 101(32)(B) of the Bankruptcy Code. The definition conforms generally to the definition of the same term in section 2(2) of the UFCA.

(4) Subsection (d) [IND. CODE § 32-2-7-12(a)] follows the approach of the definition of "insolvency" in section 101(32) of the Bankruptcy Code by excluding from the computation of the value of the debtor's assets any value that can be realized only by avoiding a transfer of an interest formerly held by the debtor or by discovery or pursuit of property that has been fraudulently concealed or removed.

(5) Subsection (e) [IND. CODE § 32-2-7-12(b)] is new. It makes clear the purpose not to render a person insolvent under this section by counting as a debt an obligation secured by property of the debtor that is not counted as an asset. *See also* comments to §§ 1(2) and 2(a), *supra*.

Section 3. Value [IND. CODE § 32-2-7-13]

1. *The Text.*—(a) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied, but value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

(b) For the purposes of Sections 4(b) [IND. CODE § 32-2-7-14(2)] and 5 [IND. CODE § 32-2-7-15], a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement.

(c) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

2. *The Comment.*—(1) This section defines "value" as used in various contexts in this Act, frequently with a qualifying adjective. The word appears in the following sections:

4(b) [IND. CODE § 32-2-7-14(2)] ("reasonably equivalent value");

5 [IND. CODE § 32-2-7-15] ("reasonably equivalent value");

8(a) [IND. CODE § 32-2-7-18(a)] ("reasonably equivalent value");

8(b) [IND. CODE § 32-2-7-18(b)], (c) [IND. CODE § 32-2-7-18(c)], and (d) [IND. CODE § 32-2-7-18(d)] ("value");

(2) Section 3(a) [IND. CODE § 32-2-7-13(a)] is adapted from section 548(d)(2)(A) of the Bankruptcy Code. *See also* UFCA section 3(a). The definition in Section 3 is not exclusive. "Value" is to be determined in light of the purpose of this Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. The definition does not specify all the kinds of consideration that do not constitute value for the purposes of this Act—*e.g.*, love and affection. *See, e.g.*, United States v. West, 299 F. Supp. 661, 666 (D. Del. 1969).

(3) Section 3(a) [IND. CODE § 32-2-7-13(a)] does not indicate what is "reasonably equivalent value" for a transfer or obligation. Under this Act, as under § 548(a)(2) of the Bankruptcy Code, a transfer for security is ordinarily for a reasonably equivalent value notwithstanding a discrepancy between the value of the asset transferred and the debt

secured, since the amount of the debt is the measure of the value of the interest in the asset that is transferred. *See, e.g.*, Peoples-Pittsburg Trust Co., v. Holy Family Polish Nat'l Catholic Church, Carnegie, 19 A.2d 360 (Pa. 1941). If, however, a transfer purports to secure more than the debt actually incurred or to be incurred, it may be found to be for less than a reasonably equivalent value. *See, e.g.*, *In re Peoria Braumeister Co.*, 138 F.2d 520, 523 (7th Cir. 1943) (holding chattel mortgage securing a \$3000 note to be fraudulent when the debt secured was only \$2500); *Hartford Acc. & Indemnity Co. v. Jirasek*, 235 N.W. 836, 839 (Mich. 1931) (holding quitclaim deed given as mortgage to be fraudulent to the extent the value of the property transferred exceeded the indebtedness secured). If the debt is a fraudulent obligation under this Act, a transfer to secure it as well would also be vulnerable to attack as fraudulent.

(4) Section 3(a) [IND. CODE § 32-2-7-13(a)] of the UFCA has been thought not to recognize that an unperformed promise could constitute fair consideration. *See James Angell McLaughlin, Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 414 (1933). Courts construing these provisions of the prior law nevertheless have held unperformed promises to constitute value in a variety of circumstances. *See, e.g.*, *Harper v. Lloyd's Factors, Inc.*, 214 F.2d 662 (2d Cir. 1954) (transfer of money for promise of factor to discount transferor's purchase-money notes given to fur dealer); *Schlecht v. Schlecht*, 209 N.W. 883, 886-87 (Minn. 1926) (transfer for promise to make repairs and improvements on transferor's homestead); *Farmer's Exchange Bank v. Oneida Motor Truck Co.*, 232 N.W. 536 (Wis. 1930) (transfer in consideration of assumption of certain of transferor's liabilities); *see also Hummel v. Cernocky*, 161 F.2d 685 (7th Cir. 1947) (transfer in consideration of cash, assumption of a mortgage, payment of certain debts, and agreement to pay other debts). Likewise a transfer in consideration of a negotiable note discountable at a commercial bank, or the purchase from an established, solvent institution of an insurance policy, annuity, or contract to provide care and accommodations clearly appears to be for value. On the other hand, a transfer for an unperformed promise by an individual to support a parent or other transferor has generally been held voidable as a fraud on creditors of the transferor. *See, e.g.*, *Springfield Ins. Co. v. Fry*, 267 F. Supp. 693 (N.D. Okla. 1967); *Sandler v. Parlapiano*, 258 N.Y.S. 88 (N.Y. App. Div. 1932); *Warwick Municipal Employees Credit Union v. Higham*, 259 A.2d 852 (R.I. 1969); *Hulsether v. Sanders*, 223 N.W. 335 (S.D. 1929); *Cooper v. Cooper*, 124 S.W.2d 264, 267 (Tenn. Ct. App. 1939); Note, *Rights of Creditors in Property Conveyed in Consideration of Future Support*, 45 IOWA L. REV. 546, 550-62 (1960). This Act adopts the view taken in the cases cited in determining whether an unperformed promise is value.

(5) Section 3(b) [IND. CODE § 32-2-7-13(b)] rejects the rule of such cases as *Durrett v. Washington Nat'l Ins. Co.*, 621 F.2d 201 (5th Cir. 1980) (nonjudicial foreclosure of a mortgage avoided as a fraudulent transfer when the property of an insolvent mortgagor was sold for less than 70 percent of its fair value); and *Abramson v. Lakewood Bank & Trust Co.*, 647 F.2d 547 (5th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982) (nonjudicial foreclosure held to be fraudulent transfer if made without fair consideration). Subsection (b) adopts the view taken in *Lawyers Title Ins. Corp. v. Madrid*, 21 B.R. 424 (B.A.P. 9th Cir. 1982), *aff'd on other grounds*, 725 F.2d 1197 (9th Cir. 1984), that the price bid at a public foreclosure sale determines the fair value of the property sold. Subsection (b) prescribes the effect of a sale meeting its requirements, whether the asset sold is personal or real property. The rule of this subsection applies to a foreclosure by sale of the interest

of a vendee under an installment land contract in accordance with applicable law that requires or permits the foreclosure to be effected by a sale in the same manner as the foreclosure of a mortgage. *See* GEORGE E. OSBORNE ET AL., REAL ESTATE FINANCE LAW 83-84, 95-97 (1979). The premise of the subsection is that “a sale of the collateral by the secured party as the normal consequence of default . . . [is] the safest way of establishing the fair value of the collateral” 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1227 (1965). *See also* *In re Excello Press, Inc.*, 890 F.2d 896 (7th Cir. 1989).

*Section 4. Transfers Fraudulent as to Present
and Future Creditors [IND. CODE § 32-2-7-14]*

1. *The Text.*—A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

- (a) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
- (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
 - (1) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
 - (2) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

2. *The Comment.*—(1) Section 4(a) [IND. CODE § 32-2-7-14(1)] is derived from section 7 of the UFCA. This section retains the “badges of fraud” approach currently used by Indiana courts. *See, e.g.*, *Milburn*, 34 N.E. at 983; 36 N.E. at 360 (Ind. 1894); *LaPorte Prod. Credit Ass'n*, 567 N.E.2d at 1202; *Jackson*, 481 N.E.2d 395; *Arnold*, 398 N.E.2d 442; *Eyler*, 760 F.2d 1129 (interpreting Indiana law); *Nader*, 323 F.2d 139; *In re Delagrange*, 65 B.R. 97. Badges of fraud, however, are not evil in and of themselves. They are best used when their purpose is kept in mind: as practical bridges from actual, provable, acts to a deceptive and fraudulent state of mind. In short, they are the traces of actual fraudulent intent. Given the slippery nature of fraud, however, there can be no routinized, mechanical test for finding fraudulent intent. As a result, the presence, or absence, of a particular number of such badges of fraud is not determinative. The holdings of prior Indiana cases that the question of whether the debtor acted with the actual intent to hinder, delay or defraud remains one of fact continues. Indiana, however, is adopting a uniform act enacted in a majority of jurisdictions. As a consequence, factors which other courts have found indicate fraud will be relevant here. A partial listed of these factors appears in comments (5) and (6), *infra*.

(2) Section 4(b) [IND. CODE § 32-2-7-14(2)] is derived from sections 5 and 6 of the UFCA but substitutes “reasonably equivalent value” for “fair consideration.” The transferee’s good faith was an element of “fair consideration” as defined in section 3 of the UFCA, and lack of fair consideration was one of the elements of a fraudulent transfer as defined in four sections of the UFCA. The transferee’s good faith is irrelevant to a determination of the adequacy of the consideration under this Act, but lack of good faith may be a basis for withholding protection of a transferee or obligee under section 8, *infra*.

(3) Unlike the UFCA as originally promulgated, this Act does not prescribe different tests when a transfer is made for the purpose of security and when it is intended to be

absolute. The premise of this Act is that when a transfer is for security only, the equity or value of the asset that exceeds the amount of the debt secured remains available to unsecured creditors and thus cannot be regarded as the subject of a fraudulent transfer merely because of the encumbrance resulting from an otherwise valid security transfer. Disproportion between the value of the asset securing the debt and the size of the debt secured does not, in the absence of circumstances indicating a purpose to hinder, delay, or defraud creditors, constitute an impermissible hindrance to the enforcement of other creditors' rights against the debtor-transferor. *Cf.* UCC § 9-311.

(4) Subparagraph (1) of section 4(b) [IND. CODE § 32-2-7-14(2)(A)] is an adaptation of section 5 of the UFCA but substitutes "unreasonably small [assets] in relation to the business or transaction" for "unreasonably small capital." The reference to "capital" in the UFCA is ambiguous in that it may refer to net worth or to the par value of stock or to the consideration received for stock issued. The special meanings of "capital" in corporation law have no relevance in the law of fraudulent transfers. The subparagraph focuses attention on whether the amount of all the assets retained by the debtor was inadequate, *i.e.*, unreasonably small, in light of the needs of the business or transaction in which the debtor was engaged or about to engage. *See* Bruce A. Markell, *Towards True and Plain Dealing: A Theory of Fraudulent Transfers Involving Unreasonably Small Capital*, 21 IND. L. REV. 469 (1988).

(5) Courts have considered many factors when determining whether the debtor had an actual intent to hinder, delay, or defraud one or more creditors. Proof of the existence of any one or more of the factors listed in comment (6) below may be relevant evidence as to the debtor's actual intent but does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation. The list of factors appearing below includes most of the badges of fraud that have been recognized by the courts in construing and applying the Statute of 13 Elizabeth and section 7 of the UFCA. Not all of the badges should receive equal weight in every case. The presence of certain badges in combination establishes fraud conclusively—*i.e.*, without regard to the actual intent of the parties—when they concur as provided in section 4(b) or in section 5.

Most of the factors below have a long heritage in fraudulent transfer law. The fact that a transfer has been made to a relative or to an affiliated corporation has not been regarded as a badge of fraud sufficient to warrant avoidance when unaccompanied by any other evidence of fraud. The courts have uniformly recognized, for example, that a transfer to a closely related person—discussed in comment 6(a)—warrants close scrutiny of the other circumstances, including the nature and extent of the consideration exchanged. *See* 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 307 (rev. ed. 1940). The factors in comments 6(b), 6(c), 6(d) and 6(e) are all adapted from the classic catalogue of badges of fraud provided by Lord Coke in Twyne's Case, 3 Coke 80b, 76 Eng. Rep. 809 (Star Chamber 1601). Lord Coke also included the use of a trust and the recitation in the instrument of transfer that it "was made honestly, truly, and bona fide," but the use of the trust is fraudulent only when accompanied by elements or badges specified in this Act, and recitals of "good faith" can no longer be regarded as significant evidence of a fraudulent intent.

(6) In considering badges of fraud generally, a court should evaluate all the relevant circumstances involving a challenged transfer or obligation. Thus the court may appropriately take into account all indicia negativing as well as those suggesting fraud, as illustrated in the following reported cases:

(a) Whether the transfer or obligation was to an insider: *Salomon v. Kaiser*, 722 F.2d 1574, 1582-83 (2d Cir. 1983) (holding insolvent debtor's purchase of two residences in the name of his spouse and the creation of a dummy corporation for the purpose of concealing assets to be evidence of fraudulent intent); *Travelers Indemnity Co. v. Cormaney*, 138 N.W.2d 50 (Iowa 1965) (noting that a transfer between spouses was a circumstance that shed suspicion on the transfer and that with other circumstances warranted avoidance); *Lumpkins v. McPhee*, 286 P.2d 299 (N.M. 1955) (holding that transfer from daughter to mother indicated fraud but was not fraudulent due to adequacy of consideration and delivery of possession by transferor); *Hatheway v. Hanson*, 297 N.W. 824 (Iowa 1941) (holding that transfer from parent to child requires a critical examination of surrounding circumstances, which, together with other indicia of fraud, warranted avoidance); *Milburn*, 34 N.E. at 985 (Ind. 1893); *Banner Construction Corp. v. Arnold*, 128 So.2d 893 (Fla. Dist. App. 1961) (finding that assignment by one corporation to another having identical directors and stockholders constituted a badge of fraud).

(b) Whether the transferor retained possession or control of the property after the transfer: *Jones v. Gott*, 10 Ind. 250 (1858); *Cable Co. v. McElhoe*, 108 N.E. 790 (Ind. App. 1915); *Allen v. Massey*, 84 U.S. (17 Wall.) 351 (1872) (joint possession of furniture by transferor and transferee considered in holding transfer to be fraudulent); *Warner v. Norton*, 61 U.S. (20 How.) 448 (1857) (surrender of possession by transferor deemed to negate allegations of fraud); *Harris v. Shaw*, 272 S.W.2d 53 (Ark. 1954) (retention of property by transferor said to be a badge of fraud and, together with other badges, warrants avoidance of transfer); *Stephens v. Reginstein*, 8 So. 68 (Ala. 1890) (transferor's retention of control and management of property and business after transfer held material in determining transfer to be fraudulent). *See also IND. CODE § 32-2-1-7* [repealed in 1993 by the Indiana Act] (raising presumption of fraud from sale of goods without change in possession).

(c) Whether the transfer or obligation was concealed or disclosed: *Warner*, 61 U.S. at 448 (although secrecy said to be a circumstance from which, when coupled with other badges, fraud may be inferred, transfer was held not to be fraudulent when made in good faith and transferor surrendered possession); *W.T. Raleigh Co. v. Barnett*, 44 So.2d 585 (Ala. 1950) (failure to record a deed in itself said not to evidence fraud, and transfer held not to be fraudulent); *Walton v. First Nat'l Bank*, 22 P. 440 (Col. 1889) (agreement between parties to conceal the transfer from the public said to be one of the strongest badges of fraud).

(d) Whether, before the transfer was made or obligation was incurred, a creditor sued or threatened to sue the debtor: *Spiers v. Whitesell*, 61 N.E. 28 (Ind. App. 1901) (conveyance for \$1 coupled with agreement by transferee to take care of transferor void as against creditor who reduced claim to judgment a few weeks thereafter); *Harris*, 272 S.W.2d at 53 (transfer held to be fraudulent when causally connected to pendency of litigation and accompanied by other badges of fraud); *Pergrem v. Smith*, 255 S.W.2d 42 (Ky. App. 1953) (transfer in anticipation of suit deemed to be a badge of fraud; transfer held fraudulent when accompanied by insolvency of transferor who was related to transferee); *Bank of Sun Prairie v. Hovig*, 218 F. Supp. 769 (W.D. Ark. 1963) (although threat or pendency of litigation said to be an indicator of fraud, transfer was held not to be fraudulent when adequate consideration and good faith were shown).

(e) Whether the transfer was of substantially all the debtor's assets: *Walbrun v. Babbitt*, 83 U.S. (16 Wall.) 577 (1872) (sale by insolvent retail shop owner of all of his inventory in a single transaction held to be fraudulent); *Lumpkins*, 286 P.2d at 299 (N.M. 1955) (although transfer of all assets said to indicate fraud, transfer held not to be fraudulent because full consideration was paid and transferor surrendered possession); *Cole v. Mercantile Trust Co.*, 30 N.E. 847 (N.Y. 1892) (transfer of all property before plaintiff could obtain a judgment held to be fraudulent).

(f) Whether the debtor had absconded: *In re Thomas*, 199 F. 214 (N.D.N.Y. 1912) (when debtor collected all of his money and property with the intent to abscond, fraudulent intent was held to be shown).

(g) Whether the debtor had removed or concealed assets: *Bentley v. Young*, 210 F. 202 (S.D.N.Y. 1914), *aff'd*, 223 F. 536 (2d Cir. 1915) (debtor's removal of goods from store to conceal their whereabouts and to sell them held to render sale fraudulent); *Cioli v. Kenourgios*, 211 P. 838 (Cal. App. 1922) (debtor's sale of all assets and shipment of proceeds out of the country held to be fraudulent notwithstanding adequacy of consideration).

(h) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred: *Jameson v. Dilley*, 61 N.E. 601 (Ind. App. 1901) (inadequate consideration stated as grounds for setting aside transfer even though transferor had no notice of intention to defraud); *Texas Sand Co. v. Shield*, 381 S.W.2d 48 (Tex. 1964) (inadequate consideration said to be an indicator of fraud, and transfer held to be fraudulent because of inadequate consideration, pendency of suit, family relationship of transferee, and fact that all non-exempt property was transferred); *Weigel v. Wood*, 194 S.W.2d 40 (Mo. 1946) (although inadequate consideration said to be a badge of fraud, transfer held not to be fraudulent when inadequacy not gross and not accompanied by any other badge; fact that transfer was from father to son held not sufficient to establish fraud); *Toomay v. Graham*, 151 S.W.2d 119 (Mo. Ct. App. 1941) (although mere inadequacy of consideration said not to be a badge of fraud, transfer held to be fraudulent when accompanied by badges of fraud).

(i) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation was incurred: *Bank of Sun Prairie*, 218 F. Supp. at 769 (although the insolvency of the debtor said to be a badge of fraud, transfer held not fraudulent when debtor was shown to be solvent, adequate consideration was paid, and good faith was shown, despite the pendency of suit); *Harris*, 272 S.W.2d at 53 (insolvency of transferor said to be a badge of fraud and transfer held fraudulent when accompanied by other badges of fraud); *Wareheim v. Bayliss*, 131 A. 27 (Md. 1925) (although insolvency of debtor acknowledged to be an indicator of fraud, transfer held not to be fraudulent when adequate consideration was paid and whether debtor was insolvent in fact was doubtful).

(j) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred: *Commerce Bank of Lebanon v. Halladale A Corp.*, 618 S.W.2d 288, 292 (Mo. Ct. App. 1981) (when transferor incurred substantial debts near in time to the transfer, transfer was held to be fraudulent due to inadequate consideration, close family relationship, the debtor's retention of possession, and the fact that almost all the debtors' property was transferred).

(k) Whether the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor: *Voest-Alpine Trading USA Corp. v. Vantage Steel Corp.*, 919 F.2d 206 (3d Cir. 1990) (bank forecloses on assets of steel company at 5:00 p.m. on a Friday, and then transfers assets to affiliate of debtor; bank makes loan to affiliate to enable it to purchase at foreclosure sale on almost the same terms as old loan; and new business opens up Monday morning.). The evil targeted by this factor is not hard to identify: collusive and abusive use of a lienor's superior position to eliminate junior creditors while leaving equity holders unaffected. The kind of disposition sought to be reached here is exemplified by that found in *Northern Pacific Co. v. Boyd*, 228 U.S. 482 (1913), the leading case in establishing the absolute priority doctrine in reorganization law. There the Court held that a reorganization whereby the secured creditors and the management-owners retained their economic interests in a railroad through a foreclosure that cut off claims of unsecured creditors against its assets was in effect a fraudulent disposition. *Id.* at 502-05. See Bruce A. Markell, *Owners, Auctions and Absolute Priority in Bankruptcy Reorganizations*, 44 STAN. L. REV. 69, 74-83 (1991); Jerome Frank, *Some Realistic Reflections on Some Aspects of Corporate Reorganization*, 19 VA. L. REV. 541, 693 (1933). For cases in which an analogous injury to unsecured creditors was inflicted by a lienor and a debtor, see *Jackson v. Star Sprinkler Corp. of Fla.*, 575 F.2d 1223, 1231-34 (8th Cir. 1978); *Heath v. Helmick*, 173 F.2d 157, 161-62 (9th Cir. 1949); *Toner v. Nuss*, 234 F. Supp. 457, 461-62 (E.D. Pa. 1964); and see *In re Spotless Tavern Co., Inc.*, 4 F. Supp. 752, 753, 755 (D.Md. 1933).

(7) Nothing in comments (5) and (6) is intended to affect the application of sections 2-402(2), 9-205, 9-301, or 6-105 of the UCC, codified in Chapter 1 of Article I of Title 26 of the Indiana Code. Section 2-402(2) recognizes the generally prevailing rule that retention of possession of goods by a seller may be fraudulent but limits the application of the rule by negating any imputation of fraud from "retention of possession in good faith and current course of trade by a merchant-seller for a commercially reasonable time after a sale or identification." Section 9-205 explicitly negates any imputation of fraud from the grant of liberty by a secured creditor to a debtor to use, commingle, or dispose of personal property, collateral, or to account for its proceeds. The section recognizes that it does not relax prevailing requirements for delivery of possession by a pledgor. Moreover, the section does not mitigate the general requirement of section 9-301(1)(b) that a nonpossessory security interest in personal property must be accompanied by notice-filing to be effective against a levying creditor. Finally, like the UFCA, this Act does not pre-empt the statutes governing bulk transfers, such as Article 6 of the Uniform Commercial Code. Compliance with the cited sections of the Uniform Commercial Code does not, however, insulate a transfer or obligation from avoidance. Thus a sale by an insolvent debtor for less than a reasonably equivalent value would be voidable under this Act notwithstanding compliance with the UCC.

Section 5. Transfers Fraudulent as to Present Creditors
[IND. CODE § 32-2-7-15]

1. *The Text.*—A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

2. *The Comment.*—Section 5 is derived from section 4 of the UFCA. It adheres to the limitation of the protection of that section to a creditor who extended credit before the transfer or obligation described. As pointed out in comment (2) accompanying section 4, this Act substitutes “reasonably equivalent value” for “fair consideration.”

The classic condition of financial stringency was insolvency. *Deming Hotel*, 24 N.E.2d at 912. One who has more debts than assets should not give away assets. Creditors are injured. Insolvency, however, is a term of art that has never acquired a fixed meaning. Legal insolvency, for example, refers to a balance sheet concept of more debts than assets; equitable insolvency refers to the inability to pay current debts as they became due. As set forth above in the comments to section 2, the UFTA blends both tests.

Section 6. When Transfer is Made or Obligation is Incurred

[IND. CODE § 32-2-7-16]

1. *The Text.*—For the purposes of this Act:

(1) a transfer is made:

- (i) with respect to an asset that is real property other than a fixture, but including the interest of a seller or purchaser under a contract for the sale of the asset, when the transfer is so far perfected that a good-faith purchaser of the asset from the debtor against whom applicable law permits the transfer to be perfected cannot acquire an interest in the asset that is superior to the interest of the transferee; and
- (ii) with respect to an asset that is not real property or that is a fixture, when the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this Act that is superior to the interest of the transferee;

(2) if applicable law permits the transfer to be perfected as provided in paragraph (1) and the transfer is not so perfected before the commencement of an action for relief under this Act, the transfer is deemed made immediately before the commencement of the action;

(3) if applicable law does not permit the transfer to be perfected as provided in paragraph (1), the transfer is made when it becomes effective between the debtor and the transferee;

(4) a transfer is not made until the debtor has acquired rights in the asset transferred;

(5) an obligation is incurred:

- (i) if oral, when it becomes effective between the parties; or
- (ii) if evidenced by a writing, when the writing executed by the obligor is delivered to or for the benefit of the obligee.

2. *The Comment.*—(1) One of the uncertainties in the law governing the avoidance of fraudulent transfers and obligations is the difficulty of determining when the cause of action arises. Subsection (1) clarifies this point in time. For transfers of real estate, section 6(1) fixes the time as the date of perfection against a good faith purchaser from the transferor and for transfers of fixtures and assets constituting personality, the time is fixed as the date of perfection against a judicial lien creditor not asserting rights under this Act. Perfection typically is effected by notice-filing, recordation, or delivery of unequivocal possession. See UCC §§ 9-302, 9-304, and 9-305 (security interest in personal property perfected by notice filing or delivery of possession to transferee); 4 AMERICAN LAW OF PROPERTY §§ 17.10-17.12 (1952) (recordation of transfer or delivery

of possession to grantee required for perfection against bona fide purchaser from grantor). The provision for postponing the time a transfer is made until its perfection is an adaptation of section 548(d)(1) of the Bankruptcy Code. When no steps are taken to perfect a transfer that applicable law permits to be perfected, the transfer is deemed by paragraph (2) to be perfected immediately before the filing of an action to avoid it; without such a provision to cover that eventuality, an unperfected transfer would arguably be immune to attack. Some transfers—e.g., an assignment of a bank account, creation of a security interest in money, or execution of a marital or premarital agreement for the disposition of property owned by the parties to the agreement—may not be amenable to perfection as against a bona fide purchaser or judicial lien creditor. When a transfer is not perfectible as provided in paragraph (1), the transfer occurs for the purpose of this Act when the transferor effectively parts with an interest in the asset as provided in section 1(9), *supra*.

(2) Paragraph (4) requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice-filing or recordation of a document evidencing an interest in an asset to be acquired in the future. Cf. Bankruptcy Code § 547(e); UCC § 9-203(1)(c).

(3) Paragraph (5) is new. It is intended to resolve uncertainty arising from *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 989-91, 997 (2d Cir. 1981), insofar as that case holds that an obligation of guaranty may be deemed to be incurred when advances covered by the guaranty are made rather than when the guaranty first became effective between the parties. Compare Robert J. Rosenberg, *Intercorporate Guarantees and the Law of Fraudulent Conveyances: Lender Beware*, 125 U. PA. L. REV. 235, 256-57 (1976).

An obligation may be avoided as fraudulent under this Act if it is incurred under the circumstances specified in section 4(a) or section 5(a). The debtor may receive reasonably equivalent value in exchange for an obligation incurred even though the benefit to the debtor is indirect. See *Rubin*, 661 F.2d at 991-92; *Williams v. Twin City Co.*, 251 F.2d 678, 681 (9th Cir. 1958); Rosenberg, *supra* at 243-46.

Section 7. Remedies of Creditors [IND. CODE § 32-2-7-17]

1. *The Text.*—(a) In an action for relief against a transfer or obligation under this Act, a creditor, subject to the limitations in section 8, may obtain:

- (1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
- (2) an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure prescribed by Indiana Code § 34-1-11-1, or any other applicable statute providing for attachment or other provisional remedy against debtors generally;
- (3) subject to applicable principles of equity and in accordance with applicable rules of civil procedure,
 - (i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred, its proceeds or of other property;
 - (ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
 - (iii) any other relief the circumstances may require.

(b) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

2. *The Comment.*—(1) This section is derived from sections 9 and 10 of the UFCA. Section 9 of that Act specified the remedies of creditors whose claims have matured, and section 10 enumerated the remedies available to creditors whose claims have not matured. A creditor holding an unmatured claim may be denied the right to receive payment for the proceeds of a sale on execution until his claim has matured, but the proceeds may be deposited in court or in an interest-bearing account pending the maturity of the creditor's claim. The remedies specified in this section are not exclusive.

(2) The availability of an attachment or other provisional remedy has been restricted by amendments of statutes and rules of procedure to reflect views of the Supreme Court expressed in *Sniadach v. Family Fin. Corp. of Bay View*, 395 U.S. 337 (1969), and its progeny. This judicial development and the procedural changes that followed in its wake do not preclude resort to attachment by a creditor in seeking avoidance of a fraudulent transfer or obligation. *See, e.g., Britton v. Howard Sav. Bank*, 727 F.2d 315, 317-20 (3d Cir. 1984); *Computer Sciences Corp. v. Sci-Tek Inc.*, 367 A.2d 658, 661 (Del. Super. 1976); *Great Lakes Carbon Corp. v. Fontana*, 54 A.D.2d 548 (N.Y. App. Div. 1976). Section 7(a)(2) [IND. CODE § 32-2-7-17(a)(2)] continues the authorization for the use of attachment contained in section 9(b) of the UFCA, or of a similar provisional remedy, when the state's procedure provides therefor, subject to the constraints imposed by the due process clauses of the United States and state constitutions. To the extent that this provision provides additional ground for attachment, Indiana Trial Rule 64(B) will need to be modified.

(3) Subsections (a) and (b) of section 10 of the UFCA authorized the court, in an action on a fraudulent transfer or obligation, to restrain the defendant from disposing of his property, to appoint a receiver to take charge of his property, or to make any order the circumstances may have required. Section 10, however, applied only to a creditor whose claim was unmatured. There is no reason to restrict the availability of these remedies to such a creditor, and the courts have not so restricted them. *See, e.g., Lipskey v. Voloshen*, 141 Atl. 402, 404-05 (Md. 1928) (judgment creditor granted injunction against disposition of property by transferee, but appointment of receiver denied for lack of sufficient showing of need for such relief); *Matthews v. Schusheim*, 36 Misc.2d 918, 922-23, 235 N.Y.S.2d 973, 976- 77, 991-92 (Sup. Ct. 1962) (injunction and appointment of receiver granted to holder of claims for fraud, breach of contract, and alimony arrearages; whether creditor's claim was mature said to be immaterial); *Oliphant v. Moore*, 293 S.W. 541, 542 (Tenn. 1927) (tort creditor granted injunction restraining alleged tortfeasor's disposition of property).

(4) As under the UFCA, a creditor is not required to obtain a judgment against the debtor-transferor nor to have a matured claim in order to proceed under subsection (a). *See American Surety Co. v. Conner*, 166 N.E. 783 (N.Y. 1929), 65 A.L.R. 244 (1929); 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 129 (rev. ed. 1940); § 1(3) & (4), *supra*. In this regard, *Jackson v. Saylor*, 63 N.E. 881 (Ind. App. 1902) is disapproved to the extent that it holds that a court will set aside a fraudulent transfer unless the defendant has no property other than that which is the subject of the fraudulent transfer action.

(5) The provision in subsection (b) for a creditor to levy execution on a fraudulently transferred asset continues the availability of a remedy provided in section 9(b) of the

UFCA. *See, e.g.*, Montana Ass'n of Credit Mgmt. v. Hergert, 593 P.2d 1059, 1063, 1065 (Mont. 1979); Doland v. Burns Lumber. Co., 194 N.W. 636 (Minn. 1923); Corbett v. Hunter, 436 A.2d 1036, 1038 (Pa. Super. Ct. 1981). *See also American Surety*, 166 N.E. at 784, 65 A.L.R. at 247 ("In such circumstances he [the creditor] might find it necessary to indemnify the sheriff and, when the seizure was erroneous, assume[] the risk of error"); James A. McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 HARV. L. REV. 404, 441-42 (1933).

(6) The remedies specified in section 7 [IND. CODE § 32-2-7-17], like those enumerated in sections 9 and 10 of the UFCA, are cumulative. *McNally v. White*, 54 N.E. 794, 56 N.E. 214 (Ind. 1899) (not error for court of equity to direct property which had been fraudulently conveyed to be sold upon order of sale rather than upon execution); *Lind v. O. N. Johnson Co.*, 282 N.W. 661, 667 (Minn. 1939), 119 A.L.R. 940 (1939) (UFCA held not to impair or limit availability of the "old practice" of obtaining judgment and execution returned unsatisfied before proceeding in equity to set aside a transfer); *Conemaugh Iron Works Co. v. Delano Coal Co., Inc.*, 298 Pa. 182, 186, 148 A. 94, 95 (Pa. 1929) (UFCA held to give an "additional optional remedy" and not to "deprive a creditor of the right, as formerly, to work out his remedy at law"); 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES 120, 130, 150 (Rev. ed. 1940).

Section 8. Defenses, Liability, and Protection of Transferee
[IND. CODE § 32-2-7-18]

1. *The Text.*—(a) A transfer or obligation is not voidable under Section 4(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(b) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under Section 7(a)(1), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (c), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:

- (1) the first transferee of the asset or the person for whose benefit the transfer was made; or
- (2) any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

(c) If the judgment under subsection (b) is based upon the value of the asset transferred, the judgment must be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require.

(d) Notwithstanding voidability of a transfer or an obligation under this Act, a good-faith transferee or obligee is entitled, to the extent of the value given the debtor for the transfer or obligation, to

- (1) a lien on or a right to retain any interest in the asset transferred;
- (2) enforcement of any obligation incurred; or
- (3) a reduction in the amount of the liability on the judgment.

(e) A transfer is not voidable under Section 4(b) or Section 5 if the transfer results from:

- (1) termination of a lease upon default by the debtor when the termination is pursuant to the lease and applicable law; or
- (2) enforcement of a security interest in compliance with Article 9 of the Uniform Commercial Code.

2. *The Comment.*—(1) Subsection (a) [IND. CODE § 32-2-7-18(a)] states the rule that applies when the transferee establishes a complete defense to the action for avoidance based on section 4(a) [IND. CODE § 32-2-7-14(1)]. The subsection is an adaptation of the exception stated in section 9 of the UFCA. The person who invokes this defense carries the burden of establishing good faith and the reasonable equivalence of the consideration exchanged. *Chorost v. Grand Rapids Factory Showrooms, Inc.*, 77 F. Supp. 276, 280 (D.N.J. 1948), *aff'd*, 172 F.2d 327, 329 (3d Cir. 1949).

(2) Subsection (b) [IND. CODE § 32-2-7-18(b)] is derived from section 550(a) of the Bankruptcy Code. The value of the asset transferred is limited to the value of the levyable interest of the transferor, exclusive of any interest encumbered by a valid lien. *See* section 1(2), *supra*.

The requirement of section 550(b)(1) of the Bankruptcy Code that a transferee be “without knowledge of the voidability of the transfer” in order to be protected has been omitted as inappropriate. Knowledge of the facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee. Knowledge of the voidability of a transfer would seem to involve a legal conclusion. Determination of the voidability of the transfer ought not to require the court to inquire into the legal sophistication of the transferee.

(3) Subsection (c) [IND. CODE § 32-2-7-18(c)] is new. The measure of the recovery of a defrauded creditor against a fraudulent transferee is usually limited to the value of the asset transferred at the time of the transfer. *See, e.g.*, *United States v. Fernon*, 640 F.2d 609, 611 (5th Cir. 1981); *Hamilton Nat'l Bank of Boston v. Halstead*, 31 N.E. 900 (N.Y. 1892); *cf. Buffum v. Peter Barceloux Co.*, 289 U.S. 227 (1932) (transferee's objection to trial court's award of highest value of asset between the date of the transfer and the date of the decree of avoidance rejected because an award measured by value as of time of the transfer plus interest from that date would have been larger). The premise of section 8(c) [IND. CODE § 32-2-7-18(c)] is that changes in value of the asset transferred that occur after the transfer should ordinarily not affect the amount of the creditor's recovery. Circumstances may require a departure from that measure of the recovery, however, as the cases decided under the UFCA and other laws derived from the Statute of 13 Elizabeth illustrate. Thus, if the value of the asset at the time of levy and sale to enforce the judgment of the creditor has been enhanced by improvements of the asset transferred or discharge of liens on the property, a good faith transferee should be reimbursed for the outlay for such a purpose to the extent the sale proceeds were increased thereby. *See* Bankruptcy Code section 550(d); *Janson v. Schier*, 375 A.2d 1159, 1160 (N.H. 1977); *Anno.*, 8 A.L.R. 527 (1920). If the value of the asset has been diminished by severance and disposition of timber or minerals or fixtures, the transferee should be liable for the amount of the resulting reduction. *See* *Damazo v. Wahby*, 305 A.2d 138, 142 (Md. 1973). If the transferee has collected rents, harvested crops, or derived other income from the use or occupancy of the asset after the transfer, the liability of the transferee should be limited in any event to the net income after deduction of the expense incurred in earning the income. *See* *Anno.*, 60 A.L.R.2d 593 (1958). On the other hand, adjustment for the equities does not warrant an award to the creditor of consequential damages alleged to accrue from mismanagement of the asset after the transfer.

(4) Subsection (d) [IND. CODE § 32-2-7-18(d)] is an adaption of section 548(c) of the Bankruptcy Code. An insider who receives property or an obligation from an insolvent debtor as security for or in satisfaction of an antecedent debt of the transferor or obligor

is not a good faith transferee or obligee if the insider has reasonable cause to believe that the debtor was insolvent at the time the transfer was made or the obligation was incurred.

(5) Subsection (e)(1) [IND. CODE § 32-2-7-18(e)(1)] rejects the rule adopted in *Darby v. Atkinson*, 415 F. Supp. 33, 39-41 (W.D. Okla. 1976), that termination of a lease on default in accordance with its terms and applicable law may constitute a fraudulent transfer. Subsection (e)(2) [IND. CODE § 32-2-7-18(e)(2)] protects a transferee who acquires a debtor's interest in an asset as a result of the enforcement of a secured creditor's rights pursuant to and in compliance with the provisions of Part 5 of Article 9 of the UCC. *Cf. Calaiaro v. Pittsburgh Nat'l Bank*, 33 B.R. 288, (Bankr. W.D.Pa. 1983) (sale of pledged stock held subject to avoidance as fraudulent transfer in section 548 of the Bankruptcy Code), *rev'd*, 36 B.R. 476 (W.D.Pa. 1984) (transfer held not voidable because deemed to have occurred more than one year before bankruptcy petition filed). Although a secured creditor may enforce rights in collateral without a sale under section 9-502 or section 9-505 of the Code, the creditor must proceed in good faith (UCC section 9-103) and in a "commercially reasonable" manner. The "commercially reasonable" constraint is explicit in UCC section 9-502(2) and is implicit in section 9-505. See 2 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1224-27 (1965).

Section 9. Extinguishment of Cause of Action
[IND. CODE § 32-2-7-19]

1. *The Text.*—A cause of action with respect to a fraudulent transfer or obligation under this Act is extinguished unless action is brought:

(a) under Section 4(a), within 4 years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or could reasonably have been discovered by the claimant; or

(b) under Section 4(b) or 5(a), within 4 years after the transfer was made or the obligation was incurred.

2. *The Comment.*—(1) This section is new. Its purpose is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. See RESTATEMENT OF CONFLICT OF LAWS 2D § 143 comments (b) & (c) (1971). The section rejects the rule applied in *United States v. Gleneagles Inv. Co.*, 565 F. Supp. 556, 583 (M.D. Pa. 1983) (state statute of limitations held not to apply to action by United States based on UFCA).

(2) Statutes of limitations applicable to the avoidance of fraudulent transfers and obligations vary widely from state to state and are frequently subject to uncertainties in their application. See Samuel M. Hesson, *The Statute of Limitations in Actions to Set Aside Fraudulent Conveyances and in Actions Against Directors by Creditors of Corporations*, 32 CORNELL L.Q. 222 (1946); 100 A.L.R.2d 1094 (1965), 14 A.L.R.2d 598 (1950), 33 A.L.R. 1311 (1941), 128 A.L.R. 1289 (1940), Annos., 76 A.L.R. 864 (1932). Together with section 6 [IND. CODE § 32-2-7-16], this section should mitigate the uncertainty and diversity that have characterized the decisions applying statutes of limitations to actions to fraudulent transfers and obligations. The periods prescribed apply, whether the action under this Act is brought by the creditor defrauded or by a purchaser at a sale on execution levied pursuant to section 7(b) [IND. CODE § 32-2-7-17(b)] and whether the action is brought against the original transferee or subsequent transferee. The prescription of statutory periods of limitation does not preclude the barring of an avoidance action for laches. See § 10 and the accompanying comment *infra*.

Section 10. Supplementary Provisions [IND. CODE § 32-2-7-20]

1. *The Text.*—Unless displaced by the provisions of this Act, the principles of law and equity, including the law merchant and the law relating to principal and agent, equitable subordination, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement its provisions.

2. *The Comment.*—This section is derived from section 11 of the UFCA and section 1-103 of the UCC. The section adds a reference to “laches” in recognition of the particular appropriateness of the application of this equitable doctrine to an untimely action to avoid a fraudulent transfer. *See Louis Dreyfus Corp. v. Butler*, 496 F.2d 806, 808 (6th Cir. 1974) (action to avoid transfers to debtor’s wife when debtor was engaged in speculative business held to be barred by laches or applicable statutes of limitations); *Cooch v. Grier*, 59 A.2d 282, 287-88 (Del. Ch. 1948) (action under the UFCA held barred by laches when the creditor was chargeable with inexcusable delay and the defendant was prejudiced by the delay).

Section 11. Uniformity of Application and Construction

[IND. CODE § 32-2-7-21]

1. *The Text.*—This Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

2. *The Comment.*—Indiana will join of majority of jurisdictions when it adopts the UFTA. This section is meant to ensure that court will be able use and cite precedent from other jurisdictions when interpreting the act. Care, however, should be taken to give appropriate effect to non-uniform provisions of the Indiana Act. For example, given the deletion in Indiana of the uniform definitions of “insider”, “affiliate” and “relative,” courts should feel free to weigh any appropriate indicators of closeness or of control should the circumstances warrant.

Section 12. Short Title [not enacted]

This Act may be cited as the Indiana Uniform Fraudulent Transfer Act.

Section 13. Repeal[†]

1. *The Text.*—(a) *The following provisions of the Indiana Code and all other acts and parts of acts inconsistent herewith (except as set forth in sub-section (b) hereof) are hereby repealed as of the effective date of this Act:*

- (1) *Indiana Code § 30-1-9-7 (relating to presumption of fraudulent intent with respect to resulting trusts);*
- (2) *Indiana Code § 32-2-1-7 (relating to presumption of fraud when goods are sold without change of possession);*
- (3) *Indiana Code § 32-2-1-8 (defining creditor for purposes of Indiana Code § 32-2-1-7);*

[†] Section 4 of Public Law 144-1994 repealed several statutes. It reads:

The following are repealed: IC 30-1-9-7; IC 32-2-1-7; IC 32-2-1-8; IC 32-2-1-9; IC 32-2-1-10; IC 32-2-1-14; IC 32-2-1-15; IC 32-2-1-16; IC 32-2-1-17; IC 32-2-1-18.

- (4) Indiana Code § 32-2-1-9 (relating to transfers of real estate with intent to defraud prior or subsequent purchasers);
- (5) Indiana Code § 32-2-1-10 (providing for exception to Indiana Code § 32-2-1-9 for purchasers who take with notice);
- (6) Indiana Code § 32-2-1-14 (general fraudulent conveyance statute);
- (7) Indiana Code § 32-2-1-15 (relating to presumption of fraud for trusts settled for the use of the settlor);
- (8) Indiana Code § 32-2-1-16 (relating to rights of creditors and purchasers for transfers declared void under statutes of general application);
- (9) Indiana Code § 32-2-1-17 (relating to rights of innocent purchasers);
- (10) Indiana Code § 32-2-1-18 (stating that all questions of fraudulent intent are questions of fact); and
- (11) Indiana Code § 34-1-45-1 (providing for ability to set aside fraudulent conveyances of real estate).

(b) Nothing in this Act shall be construed to repeal any provision of Indiana Code § 27-9-3-14 (relating to fraudulent transfers in the context of insurance insolvencies).

(c) Indiana Code § 30-1-9-8 is hereby amended by striking the words "the section next before the last" in the first line thereof and inserted the following in lieu thereof: "Indiana Code § 30-1-9-7".

(d) Notwithstanding repeal as provided in Subsection (a), all statutes repealed by this Act shall continue to provide the rule of decision for and be applicable to all transfers made and obligations incurred prior to the effective date of this Act.

2. *The Comment.*—Given the wholesale revision to fraudulent transfer law envisioned by the Indiana Act, this repealer provision repeals conflicting existing law which has the same scope as the Indiana Act. These repealed laws are preserved, however, for the purpose of deciding cases involving transfers made or obligations incurred prior to the effective date of the Indiana Act.

Section 14. Transition Provisions [not enacted][†]

1. *The Text.*—This Act shall apply to all transfers made and obligations incurred, as defined in section 6, on and after its effective date. Since this Act intends to revise and simplify, rather than restate, the law of fraudulent transfers, its provisions shall not be given retroactive effect.

2. *The Comment.*—Courts in some states interpreting the UFTA have applied its provisions retroactively to transfers and obligations occurring before the effective date of enactment. While there may be some support for this proposition in states which had previously adopted the UFCA, that is not the case in Indiana. The Indiana Act is intended to change and modify Indiana law, and thus it should apply only to those transfers made and obligations incurred from and after its effective date.

[†] Section 32-2-7-1 of the Indiana Code handles transitions in a manner consistent with Indiana practice. That section reads:

- (a) This chapter applies to all transfers made and obligations incurred after June 30, 1994.
- (b) This chapter does not apply to a transfer made or an obligation incurred before July 1, 1994.

Amendment to Exemption Statute—Indiana Code section 34-2-28-1 [not enacted]

1. *The Text.*—Add the following section:

(e) (1) *The judgment debtor's receipt of real estate or personal property as the result of a transfer which the judgment debtor intended, in good faith, to be generally exempt, and which is exempt, under this section or any other applicable exemption law shall not be subject to:*

(A) avoidance under [any provision of the Indiana Uniform Fraudulent Transfer Act]; or

(B) attachment pursuant to Indiana Code § 34-1-11-1; or

(C) sale and execution pursuant to Indiana Code § 34-1-45-1.

(2) *This subsection (e) shall not apply to judgments obtained prior to the effective date of the Indiana Uniform Fraudulent Transfer Act.*

2. *The Comment.*—(1) Subsection (e) is an addition to Indiana's existing statute providing for property which is exempt from involuntary court process. It reflects a resolution of the inherent tension between state exemption laws and the actual intent provisions of fraudulent transfer law. A well-advised debtor who attempts to take advantage of state exemption laws would seem to have a clear intent to hinder unsecured creditors. But this position, if adopted, would obliterate state exemption laws. This result would seem to be contrary to the strong state policy of preserving reasonable exemptions, as demonstrated by the Indiana state constitution. IND. CONST. art. I, § 22 ("The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debtor or liability hereafter contracted . . ."). See also *Isrigg v. Pauley*, 47 N.E. 821 (Ind. 1897) (when debtor transfers exempt property and receives non-exempt property in exchange, proceeds of exchange retain exempt character in debtor's hands.).

(2) This proposed amendment address the converse of the situation in *Isrigg*: it seeks to validate a debtor's exchange of non-exempt assets for exempt ones. If this transfer is a good faith effort to convert such non-exempt property into exempt property, this amendment would provide a defense to an otherwise valid fraudulent transfer action. As with all defenses, the burden of qualifying for the defense—which includes, among other things, the burden of demonstrating good faith—falls to the defendant in the action.

(3) The Committee does not believe that the effect of this defense on creditors will be severe. After enactment, creditors will have to assume that their debtors will take full advantage of the maximum exemptions possible. As seen from section 34-2-28-1 generally, that level is modest. If, however, that level presents an unacceptable credit risk, creditors can always request a waiver of the exemption as to that creditor, or may request security for the obligation. Indeed, such exemption planned is and has been sanctioned in the Bankruptcy Code for some time. S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978) ("As under current law, the debtor will be permitted to convert non-exempt property into exempt property before filing a petition. The practice is not fraudulent as to creditors and permits the debtor to make full use of the exemptions to which he is entitled under the law.").

(4) It is also the intent of this change to enable individuals to have adequate counsel in planning their financial affairs. Under current law, a lawyer who counsels a debtor to convert non-exempt property to exempt property could run afoul of ethical considerations if the transfer is later set aside. However, if he or she does not give

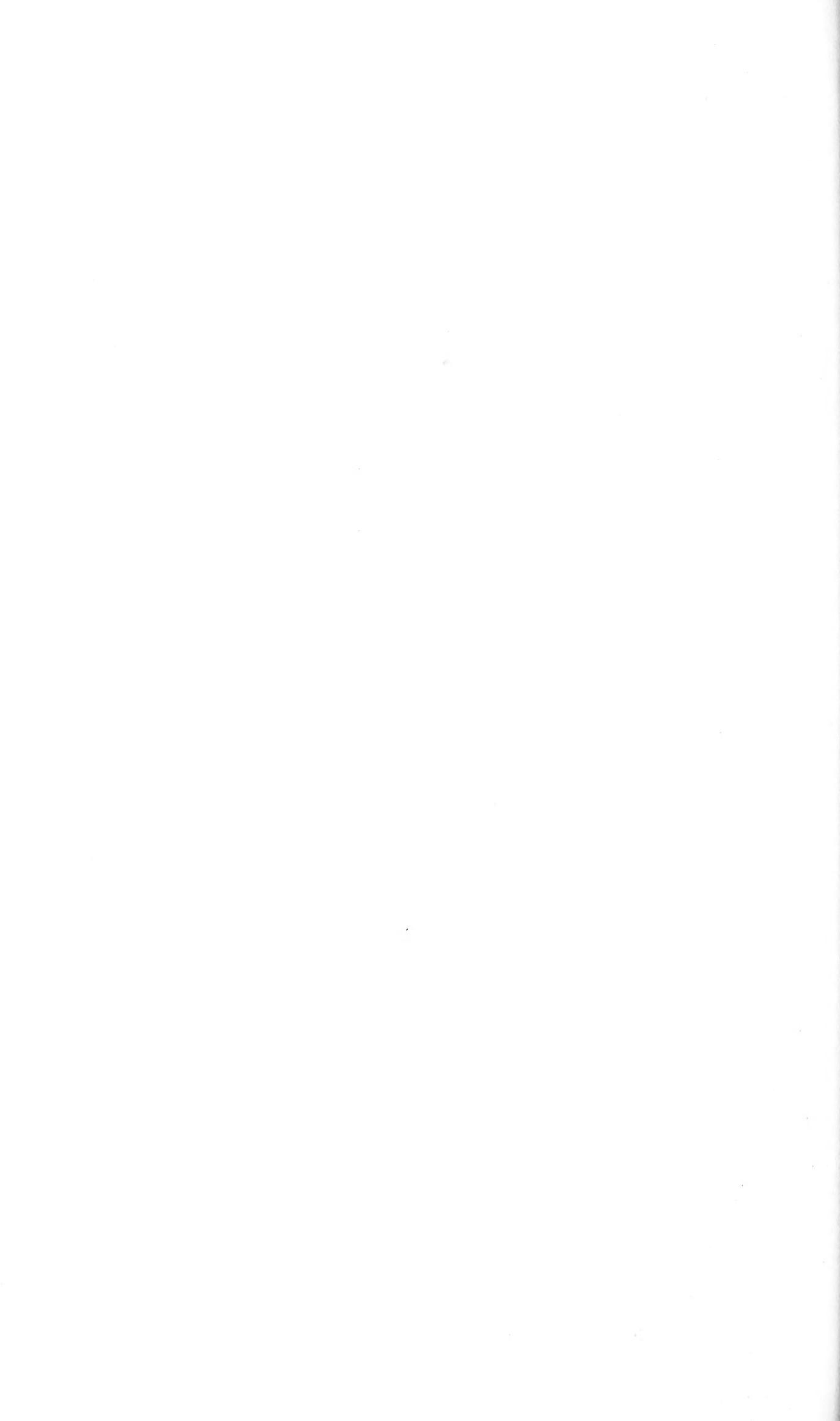
adequate counsel on the scope of the exemption law, he or she may also fail to adequately represent the client, and may even face claims of malpractice. The Act attempts to resolve this problem by allowing lawyers to counsel clients as to their ability to convert non-exempt into exempt assets. The good faith limitation, however, seeks to limit abuse of the problem.

(5) Under this amendment, no good faith transfer of non-exempt assets that yields exempt assets will be vulnerable to avoidance under the Indiana Act. The text of the statute requires both that the property received qualify as exempt property, and that the transfer be made in good faith. Thus, if the property received is not exempt the statute does not apply. Similarly, if circumstances indicate a lack of good faith—such as a sham marriage and a transfer of real property to the new husband and wife as tenants by the entireties to take advantage of section 34-2-28-1(a)(5)'s exemption—the section would not apply.

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